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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 384

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION, *Petitioner,*

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES, and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 19, 1958.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 24, 1958, as modified by order dated August 26, 1958.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated July 24, 1958, is not yet reported. A copy thereof is annexed hereto as Appendix A, p. 1a.

infra. The court's unreported order of August 26, 1958, denying the petition for rehearing and modifying the stay provisions of the judgment, is annexed hereto as Appendix B, p. 20a, *infra*. The opinion of the District Court for the Western District of New York, dated June 24, 1958, also is unreported and is annexed hereto as Appendix C, p. 21a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1958, and a timely petition for rehearing was denied without opinion on August 26, 1958. The judgment was modified as to its stay provisions on the latter date. On September 8, 1958, Mr. Justice Harlan stayed the execution and enforcement of the District Court judgment with one minor exception and on certain conditions, the most immediately important being that this petition for a writ of certiorari be filed on or before September 19, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether sound judicial administration of the Federal Power Act precludes one Court of Appeals from rendering a decision which assumes the validity of a Federal Power Commission license prior to any decision on the validity of that license by another Court of Appeals having exclusive jurisdiction under the Act to make such a determination.

2. Whether this Court, pending a final determination of the validity of a Federal Power Commission license covering petitioner's lands, should grant interim relief to prevent the imminent condemnation and destruction of these lands pursuant to a lower

court decision which presupposes the validity of the license.

3. Whether a Congressional intent to lift the specific Federal protections against the alienation of Indian tribal lands can be implied from a general statute which merely authorizes the construction of a power project and does not expressly mention either the Indians or their property.

STATUTES INVOLVED

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b):

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. * * *

Act of August 21, 1957, 71 Stat. 401:

> (a) [T]he Federal Power Commission is hereby expressly authorized and directed to issue a license

to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following: * * *

R.S. § 2116, 25 U.S.C. § 177:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. * * *

Act of September 13, 1950, 25 U.S.C. § 233:

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: * * * *And Provided further,* That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: * * *.

STATEMENT OF THE CASE

Petitioner, the Tuscarora Nation of Indians, is a recognized tribe of American Indians which owns and occupies a reservation of 6,249 acres in Niagara

County, New York. Originally residents of North Carolina, the Tuscarora Indians in the early Eighteenth Century forcibly were evicted from their homes by white settlers and fled to New York, where they were adopted as the sixth nation of the famed Iroquois Confederacy. Members of the Tuscarora Nation continuously have lived in and around the site of their present reservation since the year 1780.

Within the Tuscarora Reservation, petitioner to this day maintains a unique Indian community governed by a Chiefs Council in accordance with the Nation's time-honored customs and traditions. All of the land is held in common ownership, although a substantial portion is assigned to individuals for homesites and other beneficial purposes. Among other Federal benefits, the Tuscarora Indians still receive an annual annuity from the United States under the Treaty of November 11, 1794, 7 Stat. 44.

This case has its origins in an application to the Federal Power Commission by respondent Power Authority of the State of New York for a license to build Project No. 2216, the so-called Niagara Project, under Section 4(e) of the Federal Power Act and Public Law 85-169, 85th Congress, 71 Stat. 401. In its application, respondent proposed to construct and operate hydroelectric facilities to utilize all of the waters of the Niagara River which lawfully could be diverted for power purposes under the terms of the February 27, 1950 treaty between the United States and Canada. 1 U.S.T. 694. Included in the various facilities to be so constructed was a pumped storage reservoir covering some 2,800 acres of land.

Petitioner intervened in the proceedings before the Commission, protesting that the proposed reservoir

would cover approximately 1,000 acres of land within the Tuscarora Reservation and contesting the authority of the Power Authority to acquire Indian land for such use.

On January 30, 1958, the Commission entered an order issuing the proposed license to the Power Authority. In the opinion accompanying that order, the Commission refused to pass upon petitioner's contentions on the ground that "other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive." Subsequently, on March 21, 1958, the Commission denied the Tuscarora Nation's request for a rehearing, adding that whether the Power Authority was entitled to acquire petitioner's land in eminent domain proceedings was "a question to be resolved by a court of competent jurisdiction" and that "we are not required to render an advisory opinion on that question." The Commission also overruled petitioner's claim that the Commission had erred in failing to make a finding as required by Section 4(e) of the Act that the purpose for which Tuscarora lands were to be used under the license was not inconsistent with the purpose for which the Indian reservation was created or acquired.

Thereafter the petitioner duly filed a petition for review of the Commission's order granting the license in the United States Court of Appeals for the District of Columbia Circuit, pursuant to the provisions of Section 313(b) of the Federal Power Act, and that petition for review now is pending before said court. *Tuscarora Indian Nation v. Federal Power Commission*, No. 14,475. The petition raises issues as to the

authority of the Commission to issue a license affecting Indian lands without the express consent of Congress and as to the propriety of the Commission's refusal, on the basis of evidence outside the formal record, to make necessary findings under Section 4(e) of the Act.

In the meantime, respondent Power Authority on March 21, 1958, filed a petition in the Supreme Court of the State of New York for Niagara County to condemn 1,300 acres of land belonging to the petitioner. On April 15, 1958, however, this judicial proceeding was abandoned. Instead, the Power Authority, allegedly acting "pursuant to Article 5, Title 4 of the Public Authorities Law and the applicable provisions of Section 30 of the Highway Law" of New York, purported to appropriate some 1,383 acres of land in the Tuscarora Reservation for use as a storage reservoir by the mere filing of a map in the office of respondent John W. Johnson, the State Superintendent of Public Works.

On April 18, 1958, petitioner filed the instant complaint in the United States District Court for the Southern District of New York under 28 U.S.C. §§ 1331, 2201 and 2202. That complaint sought, *inter alia*, a declaratory judgment to the effect that the Power Authority had no right to acquire lands of the petitioner without the express consent of the United States and a permanent injunction prohibiting the Power Authority from acquiring or attempting to acquire by appropriation or otherwise lands belonging to petitioner in the absence of such consent. A temporary restraining order to the latter effect and further prohibiting the Power Authority from entering the Tuscarora Reservation, with certain excep-

tions, was entered by the court. The case then was transferred to the United States District Court for the Western District of New York pursuant to 28 U.S.C. §§ 1392(b) and 1406(a). *Tuscarora Nation of Indians v. Power Authority of the State of New York*, 161 F. Supp. 702 (S.D. N.Y., 1958).

On June 24, 1958, following a hearing, the District Court for the Western District of New York dissolved the temporary restraining order, denied the motion for a permanent injunction and dismissed the complaint. Appendix C hereto. Immediately thereafter, petitioner prosecuted an appeal to the United States Court of Appeals for the Second Circuit, which reinstated the stay previously in effect, with minor modifications, pending a final decision on appeal.

The Court of Appeals, on July 24, 1958, reversed the District Court insofar as it had dismissed the complaint and thereby had blocked the petitioner from any relief by way of a declaration of rights. Appendix A hereto. The court held that the Federal Government, by virtue of 25 U.S.C. §§ 177 and 233, had retained paramount authority to control the alienation of Indian tribal lands in New York, but that these protective statutes were subordinate to the right of eminent domain of the United States. Authority to exercise the latter right with respect to Indian reservations then was found in the direction given by Congress to the Federal Power Commission to issue a license to the Power Authority (71 Stat. 401) and in the vesting in licensees of the governmental power of eminent domain (Sec. 21 of the Federal Power Act, 16 U.S.C. § 814).

The Court of Appeals concluded that respondent Power Authority thus could institute condemnation

proceedings in either a state or federal court pursuant to the procedure established by Section 21 of the Act. Since the Power Authority had proceeded to appropriate petitioner's property under the Highway Law and the Public Authorities Law of the State of New York, however, and since Congress had not specifically declared that this method of taking could be used, the appropriation was vacated and annulled. This aspect of the Court of Appeals ruling, dealing with the inapplicability of the aforementioned New York statutes, is the subject of an appeal now pending in this Court filed by the respondent Superintendent of Public Works of the State of New York. *Johnson* v. *Tuscarora Nation of Indians*, No. , Oct. Term, 1958.

In its opinion, the Court of Appeals stayed the respondents from entering upon or damaging lands within the Tuscarora Reservation "pending the final determination of this action or any proceeding seeking to acquire the property in question" except to the extent theretofore permitted under previous stay orders. The court then requested that the District Court expedite all proceedings "as much as possible" should respondent Power Authority desire to exercise its right of eminent domain in a federal court. Almost immediately thereafter, on July 27, 1958, the Power Authority instituted a condemnation suit in the District Court for the Western District of New York pursuant to the suggestion of the Court of Appeals. *Power Authority of the State of New York* v. *1383.55 Acres of Land, et al.*, Civil Action No. 7934 (W.D. N.Y.).

On August 26, 1958, the Court of Appeals denied a petition for rehearing which the Tuscarora Nation

had timely filed. See Appendix B hereto, pp. 20a-21a, *infra*. In that request for rehearing, petitioner urged that Congress never intended to sanction the taking of Indian lands for the Niagara Power Project. Petitioner further urged that the court "should not assume the validity of appellee's license pending a decision on the Tuscarora Nation's petition for review of the Commission's order granting that license by the Court of Appeals for the District of Columbia Circuit, the tribunal having exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, 16 U.S.C. § 825*l*(b)." The latter contention was presented to the Court of Appeals for the first time in the petition for rehearing since the matter had not been in issue prior to the opinion and judgment of that court. Contemporaneous with the denial of the rehearing petition, the court ordered that its mandate issue six days thereafter and that upon issuance of the mandate the stay granted in the opinion "pending final determination of this action" would cease. See Appendix B hereto, p. 21a, *infra*.

Petitioner then applied to Mr. Justice Harlan of this Court for a stay of the mandate of the Court of Appeals pending the filing and final determination of this petition for a writ of certiorari. On September 8, 1958, following a hearing, Mr. Justice Harlan ordered that the mandate of the Court of Appeals be allowed to issue, but that the execution and enforcement of the judgment entered pursuant thereto be stayed pending the filing and determination of this petition on certain conditions and with one exception. The only condition presently relevant is that this petition shall have been filed on or before September 19, 1958. The one exception to the stay involved "the Power

Authority's right to acquire in the pending condemnation proceedings Tuscarora's lands and the possession thereof for the purpose of constructing power lines around the proposed reservoir included in the Niagara Power Project."

On September 15, 1958, the District Court for the Western District of New York in the condemnation proceedings denied a motion for summary judgment filed by respondent Power Authority, but permitted the Power Authority to enter upon petitioner's land to erect power lines in accordance with the terms of the order entered by Mr. Justice Harlan.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises an Important and Novel Question of Judicial Administration Which Calls for an Immediate Remand of the Case to the District Court With Directions to Hold the Matter in Abeyance Pending a Final Decision as to the Validity of the Federal Power Commission License.

The court below held, *inter alia*, that "the Power Authority of the State of New York as a licensee of the Federal Power Commission directed to issue a license pursuant to Public Law 85-159 (Act of August 21, 1957, 71 Stat. 401) is authorized to exercise the right of eminent domain according to the procedures specified in section 814 of the Federal Power Act (16 U.S.C.A. section 814)." Appendix A, p. 18a, *infra*. In so ruling, the court necessarily assumed that the license issued by the Federal Power Commission to the Power Authority is valid as to petitioner's lands, and that the Power Authority was properly authorized under the provisions of the Federal Power Act to exercise the governmental power of eminent

domain. Based upon the holding stemming from this assumption, the Power Authority has instituted condemnation proceedings which will result, unless stayed by action of this Court at this time, in the complete and immediate destruction of petitioner's lands within the reservoir area.

The basic assumption underlying the decision below, however, is the precise issue at stake in the pending license review proceedings before the Court of Appeals for the District of Columbia. *Tuscarora Indian Nation* v. *Federal Power Commission*, No. 14,475. Petitioner has filed in that court a petition for review of the Commission's order granting a license to respondent Power Authority, claiming: (1) that the Commission had no authority to issue a license affecting petitioner's reservation without the express consent of Congress; and (2) that the Commission erred not only in refusing to make certain findings required by Section 4(e) of the Act with respect to Indian tribal lands, but also in basing that refusal upon evidence outside the record.

These issues, which lie at the very heart of the assumption underlying the decision below, are ones within the *exclusive* jurisdiction of the Court of Appeals for the District of Columbia. Sec. 313(b) of Federal Power Act, 16 U.S.C. § 825l(b); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-337 (1958); *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 124 F. 2d 800, 804 (C.A. 3, 1941). Neither the court below nor this Court upon review of the judgment below can resolve these issues as to the validity of the license order. "For Congress, acting within its powers, has declared that the Court of Appeals [in this case, that of the District of

Columbia] shall have 'exclusive jurisdiction' to review such orders, and that its judgment 'shall be final', subject to review by this Court upon certiorari or certification." *City of Tacoma* v. *Taxpayers of Tacoma, supra,* at 336.

The decision below thus poses an important and unique problem in the judicial administration of the Federal Power Act, a problem which demands immediate action in view of the imminence of the destruction of petitioner's lands. By premising its judgment on "a forecast rather than a determination," *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 499 (1941), as to the validity of the license order under the Federal Power Act, the court below has encroached upon the exclusive jurisdiction of the Court of Appeals for the District of Columbia.

The results of such aggrandisement necessarily are chaotic. Should the District of Columbia court eventually determine that the license is invalid or that substantive or procedural defects dictate a remand of the matter to the Commission for further consideration, the underlying assumption of the judgment below would collapse and all subsequent proceedings based thereon become invalid. Meanwhile, if this Court does not grant some measure of relief, the petitioner's property will be irrevocably damaged or destroyed before any such ruling can issue.[1] Indeed, with its

[1] At this point, the Court of Appeals for the District of Columbia Circuit effectively is precluded from granting a stay pursuant to Section 313(c) of the Federal Power Act, 16 U.S.C. § 825*l*(c), since the condemnation court, the District Court for the Western District of New York, is operating under, and bound by, the mandate of the Court of Appeals for the Second Circuit.

reservation already invaded and overcome, the Tuscarora Nation would have little purpose in further pursuing the license review procedure. Unless at least interim protection now is accorded the petitioner, therefore, the statutory scheme of vesting exclusive jurisdiction to review Commission licenses in the Court of Appeals in which the petition for review is filed will be wholly frustrated and made meaningless.

Moreover, should the District of Columbia decision be favorable to petitioner's contentions, a direct conflict with the ruling below would be created as to the validity of the license. Only this Court could resolve that conflict. Preservation of the status quo thus is essential if this Court's jurisdiction to resolve such a possible conflict between circuits is not to be mooted by the irrepressible course of condemnation proceedings in the wake of an unstayed mandate.

The Court of Appeals for the Second Circuit has assumed as a present fact what is in reality an unsettled issue. At best, the decision below in presupposing the validity of the Commission license is premature and unjustified by virtue of the pending review proceedings in the Court of Appeals for the District of Columbia and in violation of basic principles of comity. At worst, the decision below is wrong as a matter of law. In either event, the Tuscarora Nation can look only to this Court to preserve the judicial review procedures of the Federal Power Act and to protect its lands from what probably is an unwarranted and unlawful condemnation.

Accordingly, petitioner suggests that this Court, in the exercise of its supervisory jurisdiction over the

administration of justice in the Federal courts, grant certiorari, vacate the judgment below and remand the case to the District Court for the Western District of New York with instructions to hold all proceedings in abeyance until the final resolution of the license review proceedings now pending in the Court of Appeals for the District of Columbia. Precedent for such action is to be found in the analagous situation involving three-judge court proceedings convened to determine the constitutionality of a state statute. There this Court frequently has ruled that such proceedings should be stayed for a reasonable time until the state courts have had opportunity to make an authoritative construction of the pertinent State statute. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941); *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101 (1944); *A. F. of L.* v. *Watson*, 327 U.S. 582 (1946); *Shipman* v. *DuPre*, 339 U.S. 321 (1950).

Respect for the Congressional mandate of exclusiveness as to the jurisdiction of the Court of Appeals for the District of Columbia and scrupulous regard "for the smooth working of the federal judiciary," *Railroad Commission* v. *Pullman Co.*, *supra*, at 501, dictate such a disposition of the instant case. If there is warrant for the condemnation now going forward in New York, it must spring from the proceedings pending in the District of Columbia. It does not lie in the mouth of the court below to resolve that issue "on the basis of preliminary guesses." *Spector Motor Service* v. *McLaughlin*, *supra*, at 105.

2. The Decision Below Raises an Important and Novel Question as to When a Congressional Intent to Lift Special Statutory Protections Over Indian Tribal Lands May be Spelled Out by Implication.

The great unknown factor in this case, of course, is the decision that will be forthcoming from the Court of Appeals for the District of Columbia with respect to the validity of the Power Authority's license and the legal propriety of the Commission's procedures in granting that license. To that uncertainty must be added the various possibilities ensuing from any effort to secure review by this Court. The suggestion made by petitioner herein that this case be remanded to the District Court to hold the matter in abeyance is premised on the very real likelihood that the District of Columbia court will hold the license defective in some manner, as well as on the need for a smooth working of the Federal judiciary in the context of the exclusive review provisions of the Federal Power Act.

At the same time, the possibility exists that the District of Columbia court will affirm the Commission's action in refusing to pass upon the petitioner's contentions with respect to the license. That court may agree with the Commission that a license proceeding is not the proper place to test the issues as to whether the Power Authority is authorized to acquire Indian tribal land and whether the Commission properly can issue a license covering such land. The court also may agree with the Commission that no findings under Section 4(e) of the Act were necessary. In such event, assuming no reversal by this Court on certiorari, the decision of the District of Columbia court would in no way be inconsistent with the ruling of the court below. Indeed, the cases then would turn on different questions.

Given these possible circumstances, it becomes apparent that the determination of the court below as to the Congressional consent given to the alienation or condemnation of petitioner's property now is ripe for review and raises an issue of substantial importance warranting the immediate exercise of this Court's certiorari jurisdiction. That issue is whether a Congressional intent to lift special statutory protections over Indian lands, which serve a key function in the Federal Government's guardianship over Indian tribes, may be spelled out by implication.

The court below properly held that the United States possesses paramount power to control and govern the territory reserved and held by Indian tribes, and that such territory may be alienated or appropriated only with the consent of Congress. *Johnson* v. *McIntosh*, 8 Wheat. (U.S.) 543 (1823); *Worcester* v. *Georgia*, 6 Pet. (U.S.) 515 (1832); *The Kansas Indians*, 5 Wall. (U.S.) 737 (1867). This general principle has been codified in R.S. § 2116, 25 U.S.C. § 177, and has been recognized as specifically applicable to Indian reservations in the State of New York by the provisions of the Act of September 13, 1950, 25 U.S.C. § 233.

The court below also correctly ruled that the Federal Government occupies a special position as the protector of Indian tribes, *United States* v. *Kagama*, 118 U.S. 375, 383-84 (1886), that only Congress can determine when that fiduciary relationship shall cease, *Winton* v. *Amos*, 255 U.S. 373, 391-92 (1921), and that Federal guardianship over the Tuscarora Nation has not yet been terminated.

Finally, the court below accurately stated that Congress in the Act of August 21, 1957, 71 Stat. 401,

did not expressly authorize the taking of part of the Tuscarora Reservation for use in the Niagara Power Project. That statute simply directed the Federal Power Commission to "issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement," in accordance with the provisions of the Federal Power Act.

The court further ruled, however, that an "implied" intent to authorize the taking of petitioner's land under the 1957 statute could be "inferred" upon consideration of the extensive character of the Project and the proximity of the required reservoir to the Tuscarora Reservation. Such a conclusion that Congressional intent to authorize the alienation of tribal lands may be found by implication or inference is directly contrary to the repeated decisions of this Court on the construction of statutes affecting Indians and is wholly inconsistent with the legislative history of the 1957 statute.

This Court consistently has held that general acts of Congress do not apply to Indians "unless so expressed as to clearly manifest an intention to include them." *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884); see also *Squire* v. *Capoeman*, 351 U.S. 1 (1956). Where a Congressional intent to affect Indians or their interests has been found, the Indians specifically have been named or their property described. *Ghouteau* v. *Commissioner*, 38 F. 2d 976, 977 (C.A. 10, 1930); *United States* v. *2005.32 Acres of Land, etc.*, 160 F. Supp. 193, 198-200 (D.S.D., 1958).

In terms of statutory construction, this Court has further ruled that treaties with Indian tribes and laws affecting Indians must be liberally construed,[2] and that doubtful expressions are to be resolved in favor of the Indians. *Winters* v. *United States*, 207 U.S. 564, 576 (1908); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912). The decision of the court below that consent may be implied or inferred from general legislation not only is contrary to these decisions, but also creates a new and important departure from hitherto settled principles which deserves full review by this Court.

In addition, the legislative history of the 1957 statute wholly negates any thesis that Congress intended or even contemplated that Indian tribal lands would be affected by the Niagara Power Project. That record shows not a single mention of the Tuscarora Nation and or its Reservation during the course of the Congressional hearings. The relevant Committee reports make not even the vaguest reference to the remotest possibility that Indian lands would be covered by the Project.[3] And the debates in the House and the Senate contain not one word about petitioner or its lands. 103 *Cong. Rec.* 11974-92, 12007-08, 13149-67. To find a legislative purpose to authorize the taking of petitioner's

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[2] *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899); *United States* v. *Winans*, 198 U.S. 371, 380-81 (1905); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 198 (1919); *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938); *Tulee* v. *Washington*, 315 U.S. 681, 684-85 (1942).

[3] H. Rep. No. 862, 85th Cong., 1st Sess., 1957 U.S. Code Cong. & Admin. News, pp. 1585 *et seq.*; S. Rep. No. 339, 85th Cong., 1st Sess.

property on such a record is to distort the term "Congressional intent" beyond recognition.[4]

The importance of the ruling below as to when courts may find Congressional consent to the alienation of tribal lands is self-evident. (Indeed, respondent John W. Johnson is prosecuting an appeal to this Court under 28 U.S.C. § 1254(2) on the theory that the Court of Appeals unduly restricted the State of New York in exercising its sovereign right of eminent domain on Indian reservations.) If the decision is allowed to stand, the special statutory protections over Indian lands, which are so essential to the Federal Government's guardianship over Indian tribes throughout the United States, will be placed in jeopardy whenever Congress in general terms authorizes conduct which might eventually impinge upon such protections. That is reason enough for the assertion of this Court's full review powers.

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[4] *Spalding* v. *Chandler*, 160 U.S. 394 (1896), cited by the court below, is not in point since this Court there found that Indian lands were "necessarily demanded" to effectuate a specific Congressional grant (160 U.S. at 406-07), whereas the Federal Power Commission found as a fact in this case that "other lands are available for reservoir use if the [Power Authority] is unable to acquire the Indian lands. . ." F.P.C. Order of January 30, 1958, p. 3.

CONCLUSION

The decision below is fraught with perils and uncertainties. It is a decision which undercuts and renders futile the review procedures established by Congress in the Federal Power Act. And it is a decision which creates a new and dangerous rule in the construction of statutes affecting Indians.

Because the court below has engaged in unwarranted guesswork as to the outcome of the pending license review proceedings in the Court of Appeals for the District of Columbia, it seems appropriate to vacate its judgment and direct the District Court to hold the matter in abeyance until the validity of the license has been finally determined. Once that issue has been resolved, the courts below can take appropriate action in the light thereof. If the Court of Appeals then persists in the ruling it has already announced, it will be time enough for this Court then to review the important question raised.

If the Court should feel otherwise about the appropriateness of the suggested remand, however, petitioner prays that a writ of certiorari now issue to review the judgment below on its merits.

Respectfully submitted,

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September 19, 1958

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 394—October Term, 1957.

(Argued July 10, 1958 — Decided July 24, 1958.)

Docket No. 25236

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION, *Plaintiff-Appellant*,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES, *Defendants-Appellees-Cross Appellants*,

—and—

SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON, *Defendant-Appellee*.

Before:

SWAN and MOORE, *Circuit Judges*, and
ANDERSON, *District Judge*.

Appeal from the United States District Court for the Western District of New York; Justin C. Morgan, *Judge*.

Tuscarora Nation of Indians, also known as Tuscarora Indian Nation, appeals from a judgment dismissing the complaint in an action against Power Authority of the State of New York, Robert Moses, and Superintendent of Public Works of the State of New York, John W. Johnson which sought: (1) a declaratory judgment declaring its rights and status; (2) a preliminary injunction against the

appropriation of plaintiff's land within the Tuscarora Reservation; (3) a temporary restraining order; (4) a permanent injunction; and (5) a judgment vacating and annulling all descriptions, maps, notices and other instruments purporting to appropriate plaintiff's property.

Power Authority of the State of New York appeals from that part of said judgment which orders that the affidavit of Henry S. Manley be stricken and only be considered as an additional brief.

Modified. Appeal by Power Authority affirmed.

ARTHUR LAZARUS, JR., Esq., Washington, D. C. (Strasser, Spiegelberg, Fried & Frank, New York, N. Y., on the brief) *for Plaintiff-Appellant.*

THOMAS F. MOORE, JR., Esq., New York, N. Y. (Samuel I. Rosenman, Henry S. Manley, John R. Davison, New York, N. Y., on the brief) *for Defendants-Appellees-Cross Appellants, Power Authority of the State of New York and Robert Moses.*

JULIUS L. SACKMAN, Associate Attorney, New York, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York, Paxton Blair, Solicitor General, New York, N. Y., on the brief) *for Defendant-Appellee, Superintendent of Public Works of the State of New York, John W. Johnson.*

MOORE, *Circuit Judge*:

The appellant Tuscarora Nation of Indians (referred to as "Tuscarora") brought this action in the federal court under 28 U. S. C. A. 1331, 2201, and 2202: (1) for a declaratory judgment to the effect that the appellees, Power Authority of the State of New York, Robert Moses, and Superintendent of Public Works of the State of New York,

John W. Johnson, have no power to acquire a portion of their lands without the express consent of the United States and (2) for a permanent injunction against the appropriation of their lands without their consent.

The suit was commenced on April 19, 1958 in the Southern District of New York, and was later transferred (161 F. Supp. 702) to the Western District, where it was heard on the merits. The decision of June 24 (not yet reported) ordered (1) that the Power Authority's motion for a three judge court be denied; (2) that the temporary restraining order previously issued be dissolved; (3) that plaintiff's motion for a permanent injunction be denied; (4) that the complaint be dismissed without costs; and (5) that the affidavit of Henry S. Manley be stricken as an affidavit and be considered as an additional brief on behalf of the defendants. The appeal is taken pursuant to 28 U. S. C. A. 1291.

The Tuscarora are a tribe of American Indians occupying lands in western New York. They migrated to central New York State from North Carolina prior to the American Revolution and became a part of the Iroquois Confederacy, sometimes referred to as the Six Nations. Subsequent to the Revolution New York State desired to move the Oneidas and Tuscaroras from central New York to the territory of the Senecas in western New York. As a result of sales of the Indians' rights of occupation the main body of Tuscaroras moved to Niagara County where they acquired three tracts of property. The first tract, a mile square (640 acres), was a right of occupancy conceded to them by the Senecas. The second tract (1280 acres) was a gift from the Senecas and the Holland Land Company. The third and largest tract, and the only tract involved in this litigation, consists of 4329 acres. This third tract was acquired in 1804 (title finally taken in 1809) for the Tuscarora through the good offices of the Secretary of War of the United States. The Tuscarora purchased the fee to this tract from the Holland Land Company out of the proceeds received from the sale of their North Caro-

lina properties. Since that time the Tuscarora have lived on these tracts as a tax-exempt Indian Reservation despite the fact that the third tract was acquired by purchase and not as a grant from the United States.

The Power Authority of the State of New York is in charge of the development of a power project in western New York known as the Niagara River Power Project. This project was authorized by Congress and made possible by a treaty with Canada (February 27, 1950), which greatly enlarged the amount of water from the Niagara River available to the United States for power purposes. Following the treaty Congress through Public Law 85-159 (Act of August 21, 1957, 71 Stat. 401) authorized and directed the Federal Power Commission to issue a license to the Power Authority for the construction and operation of a power project with capacity to utilize all of the United States' share of the water permitted to be diverted under the terms of the treaty. The license was issued on January 30, 1958. On March 28, 1958 the Power Authority filed a petition in the Supreme Court of the State of New York for Niagara County to condemn 1,383 acres of the Reservation lands of the Tuscarora Nation of Indians whose entire Reservation consisted of 6,249 acres. The portion sought to be condemned was planned to be used for a water storage reservoir in connection with the Niagara power project. On April 15, 1958 the Power Authority withdrew the condemnation proceedings in the Supreme Court of New York and by filing a map of the 1,383 acre portion of the Tuscarora Reservation pursuant to §30 of the New York State Highway Law and Article 5, Title 1 of the Public Authorities Law, appropriated the 1,383 acres for the purpose of the reservoir. At the same time a sum estimated by the Power Authority to be the fair market value of the appropriated land was, as required by Statute, deposited with the Comptroller of the State of New York. The provisions of §30 of the New York Highway Law authorize the Power Authority, after filing the

map and depositing the money, immediately to enter upon and take possession of the property described.

A power plant has been planned which will be the largest hydro-electric project in the United States. The total cost is estimated at upwards of $625,000,000 and contracts have already been authorized for more than $339,000,000. An essential part of the project is a large water storage reservoir of at least 600,000 acre feet. Construction work and power lines relocation are now at the very edge of the Tuscarora Reservation.

Although both parties have given the court the benefit of the historical development of title to Indian lands in New York State and the various treaties relating thereto, this background material affects largely tracts 1 and 2 which are not now before the court. Since tract 3 was acquired in fee by purchase the primary question is: What laws and treaties apply to, and what other obligations have been assumed by the United States and the State of New York with respect to, this particular Indian Reservation?

Appellant claims that the taking of a portion of its Reservation is in violation of Title 25, United States Code, Sections 177 and 233. Appellees, on the other hand, assert that these statutes do not apply to the State of New York which possesses sovereign power of condemnation over Indian lands, independent of and never surrendered to, the Federal Government, derived from its status as one of the original thirteen colonies.

Indian Non-Intercourse Acts: State and Federal

In order to prevent Indians from being victimized by artful scoundrels inclined to make a sharp bargain, both New York and the United States from an early date imposed restrictions on the acquisition of lands from the Indians by private persons unless adequate protection was afforded. Thus in 1777 the first Constitution of New York

State provided that "no purchases shall be binding or deemed valid unless made under the authority and with the consent of the legislature of this State" (Article XXXVII). This provision, in substance, has been continued in subsequent constitutions.

In 1790 the United States enacted its first Indian Non-Intercourse Act which imposed a similar restriction against sale "unless the same shall be made and duly executed at some public treaty, held under the authority of the United States" (1 Stat. 138). A second Non-Intercourse Act was passed in 1793. Other acts embodying substantially the same restrictions were enacted but the statute remains in virtually the same form today. Thus 25 U. S. C. A. §177 provides:

> "*Purchases or grants of lands from Indians.* No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

Subsequent Laws and Decisions

As time passed the states were given more and more power to apply their laws in the Reservations of the Indians. Appellees refer to many cases, spread over a century and a half or more of dealings between the State of New York and the Indians within its boundaries, relative to Indian Reservations or tribal lands, reveal transfers in which parcels of land or interests therein, such as highways, easements for telephone lines and other takings short of the seizure of the whole or a substantial portion of such Reservations or tribal land, have been taken, granted or conveyed without special authorization by Congress and with the express, or at least tacit, acquiescence of the executive official of the United States chargeable with the responsibility for Indian affairs. A great majority of these cases have been in the State Courts of New York and two or three have been in the District Court of the United States. An examination of these cases discloses that between the earliest years of this Nation's existence and 1950, a large measure of social and economic intercourse relating to Indian tribal matters in the State of New York has been left to the State of New York through either the indifference or approval or express authorization of the federal executive officials who at a particular time had the responsibility for the care of the Indians. Despite this situation the Court of Appeals of New York has recognized that during all of this period, the Indians are and always have been, since the formation of this Government, the wards of the Nation and not of the States, and that the Federal Government has never relinquished its suzerainty over them.

In both criminal and civil fields Congress allowed the State laws to be extended onto the Reservations. However, in the act of September 13, 1950, 25 U. S. C. A. §233, granting to the courts of New York State jurisdiction in civil actions between Indians, there were specific excep-

tions, the first being that nothing therein contained shall be construed as subjecting the lands within Indian Reservations in the State of New York to taxation or subjecting them to execution on any judgment except a judgment by one tribal member against another as to use or possession of land; and second, "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Reservation in the State of New York; * * *." This second exception was made the subject of comment in the Report of the Joint Legislative Committee on Indian Affairs to the Legislature of the State of New York as follows:

> "Neither would the proposed law permit taxation or alienation of reservation land, although many Indians have been led to believe that these are the very ends the bills aim to accomplish.
>
> "Specific exclusion of the powers of taxation and disturbance of titles makes it clear that adoption of the bills would not end all Federal guardianship * * *."

The Power Authority's License

The Power Authority claims to have derived its authority from a license issued to it pursuant to Public Law 85-159, 71 Stat. 401 which authorized and directed the Federal Power Commission to issue a license to the Power Authority for the construction and operation of a power project to utilize all of the United States' share of the water of the Niagara River permitted to be used by International agreement. Such a license was issued to the Power Authority although vigorously opposed by the Tuscarora. The Commission, however, did not pass on the eminent domain question because it expressly declared "The question of whether the Licensee is empowered to acquire Intervener's land in eminent domain proceedings is, in our view, a question to be resolved by a court of

competent jurisdiction. In any event, we are of the view that we are not required to render an advisory opinion on that question." A petition for review of the Commission's order is presently pending before the Court of Appeals for the District of Columbia.

Under §4(e) of the Federal Power Act, 16 U. S. C. A. §797, the Commission is authorized to issue licenses for the purpose of constructing reservoirs and power houses, etc., even "upon any part of the public lands and reservations of the United States" except that such a license "shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired and shall be subject to and contain such conditions as the Secretary of the Department of Interior under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization for such reservations; * * *."

The acquisition of property for the construction of reservoirs, etc., is implemented by §814 of the Federal Power Act which provides for the exercise by the licensee of the right of eminent domain. The section specifically provides for the manner in which this power may be exercised, namely, "It may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the state courts. * * *"

The United States Guardianship of Indian Rights

Over the last one hundred and fifty years there have been many court decisions relating to the rights of Indians. Although each case was decided on the facts which gave rise to the controversy, there has been uniform support for the doctrine that the Indian tribes are wards of the United States and that a general guardianship power is vested in the United States to protect them and their

property. This philosophy on the part of the courts has been expressed in various ways.

In the New York Court of Appeals, *People Ex Rel. Cusick* v. *Daly*, 212 N. Y. 183 (1914), the court, after referring to the Supreme Court's decision in the *Kagama* case (*United States* v. *Kagama*, 118 U. S. 375 (1886)), which stressed the fact that the Reservation had been set apart by the United States said: "But these were not the controlling elements in the decision, as will be seen from a perusal of the whole opinion, for the power of the Federal authorities was asserted primarily because the Indian tribes in this country were, and always had been since the formation of the government, the wards of the nation and not of the states." This case dealt specifically with the Tuscarora Indians. The court traced their history from their North Carolina days to their final Reservation in Niagara County, saying: "Interesting as these facts may be to the student of history, they have little bearing upon the question to be decided. The truth is that we are dealing with dual relations growing out of peculiar conditions. The state of New York has enacted laws conferring upon these Indian tribes certain powers to regulate their own affairs, and to protect their lands from invasion (see Indian Law, Cons. Laws, Ch. 26), but the Federal government has never relinquished its suzerainty over them." The court further held that there was "no less reason for placing them [the New York Indians] under the protectorate of the Federal government than there was for extending it to the other tribes resident in any of the original thirteen colonies" (p. 192). The court continued "Congress has continued to act upon the theory that it has jurisdiction of our New York Indian tribes no less than of their brethren in the west" (p. 193). The conclusion of the court was that "From this confusing history of Federal and state legislation and judicial decisions upon matters affecting the relations of our governments to the Indians,

it will be seen that the question is not free from doubt, but there are a few considerations which incline us to the view that the Federal jurisdiction must prevail" (p. 196).

The *Cusick* case was followed by *Mulkins* v. *Snow*, 232 N. Y. 47, in which the court said "They [the Indians] are the wards of the nation and Congress has full authority to legislate for them within their reservation. (*People ex rel. Cusick* v. *Daly*, 212 N. Y. 183). When the state of New York legislates in relation to their affairs, its action is subject to the paramount authority of the federal government" (p. 51).

In the Supreme Court of the United States this guardianship has been frequently restated. It was described in the *Kagama* case, *supra*, as follows:

> "* * * These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. * * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen."

In *United States* v. *Candelaria*, 271 U. S. 432, 439, the court said:

> "'Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, *whether within*

its original territory or territory subsequently acquired, and whether within or without the limits of State * * *' It is for that body [Congress] and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.' "

Not only has Congress not abandoned the field with respect to the property interests of Indian tribes in the State of New York but it has, by the enactment of the express reservation concerning land interests of the Indian tribes in New York in Title 25 U. S. C. A. §233, pointed up and reaffirmed its paramount authority over Indian tribal lands.

The primary question now to be decided is whether sections 177 and 233 of Title 25 U. S. C. A. prohibit the taking of any portion of the lands of the Tuscarora or whether the general power of the sovereign, namely, the United States, to take the lands of any of its subjects for appropriate public purposes, provided just compensation is paid, is paramount and impliedly written into all statutes affecting property.

A secondary question is, assuming that power of eminent domain exists, has it been exercised by the proper authority and in the manner prescribed by law?

Were the lands in question owned by citizens other than Indians, there would be no question but that the power of eminent domain could be exercised for the purposes of the power project. To create an exception it must be found that the Indians occupy some special status which renders them immune from the application of this principle. For many years their Reservations have been specially protected by law. They have practiced their own tribal customs and enjoyed their own way of life without too much outside interference. The present appropriation calls for the destruction of approximately one-third of the entire

Reservation embraced within tract number 3. Unless there is some over-riding need or equity in others, the situation would seem to call for the exercise of that guardianship protection which the United States has asserted and exerted over the years.

On the other hand, as years go by there has been conscious effort to assimilate the Indians into the communities in which they live and to extend to them the same equal protection of the laws as all other citizens enjoy. This view is well exemplified in the Senate Report which preceded the passage of the civil jurisdiction bill in 1950 in which it was said that:

> "Your committee believes that all citizens of a State should be parts of one social order; that anything which conflicts with this principle should be brought into conformity therewith at the earliest time consistent with justice; that the civil relationship and responsibility of all citizens within a State should be equal as well as just and under the jurisdiction of a common code of laws that govern all and protect all alike." (Sen. Rep. No. 1836, June 15, 1950.)

If the Indians are to enjoy equal protection of the laws and all the other benefits extended to each citizen it may well be that they should bear some of the burdens including that of being subjected to having their lands condemned for public purposes, beneficial to the State in which they live.

The sovereign power of the United States is exercised by Congress and it would be anomalous indeed if this very power which could make its own land subject to condemnation (16 U. S. C. A. section 797) could not be extended to the land of those over whom it exercises its guardianship. This power has been asserted from time to time as, for example, in the Reclamation Acts, the appropriation of vast areas in the mid-west for irrigation and other public

projects. In *Henkel* v. *United States*, 237 U. S. 43, 49, 50, the Supreme Court said:

> "The authority of the Congress of the United States to devote these lands to irrigation purposes is unquestioned. As a matter of fact, it might, if it saw fit, remove the Indians therefrom and devote the land to such uses. Recognizing the injustice of arbitrary appropriations to other uses, no effort has been made to take these lands without compensation to the Indians for the improvements which they have made, and they have been given the right to select other lands in place of those released. The reclamation projects undertaken by the Government are very extensive, and cover many States; and they must involve in their construction, the flooding of lands in connection with dams designed to hold water for such purposes; and must necessarily include much territory which is included in Indian reservations. This situation was of course well known to Congress when it passed the Reclamation Act, and we cannot doubt, in view of the broad authority conferred by §§ VII and X above quoted, that it was the purpose of Congress to give the Secretary of the Interior the right to acquire such rights as are here involved, when necessary for reclamation purposes. In carrying out the purposes of the act, the Secretary of the Interior is authorized to acquire any rights or property necessary for that purpose, and to acquire the same, either by purchase or by condemnation. He is specifically authorized to perform any and all acts necessary and proper for the purpose of carrying into effect the provisions of the act. Authority could hardly have been conferred in more comprehensive terms, and we do not believe it was the intention of Congress, because of the Indians' right of selection of lands under the circumstances here shown, to reserve such lands from the operation of the act. To do so might defeat the recla-

mation projects which it was evidently the purpose of Congress to authorize and promote. * * *".

The power of condemnation was also recognized in the passage of section 409(a) Title 25 U. S. C. A. which provides that "Whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, * * *" the proceeds therefrom may with the approval of the Secretary of the Interior be reinvested in other lands selected by the Indians and shall become restricted as to alienation and taxability as the lands condemned.

The court below came to the conclusion that "There is no constitutional requirement that the appropriation now involved be specifically authorized by an act of Congress" and that neither sections 177 nor 233 of Title 25 U. S. C. A. presented any bar to the exercise of eminent domain. The wording of these two statutes does not, in our opinion, lead to such a conclusion. However, the same result is reached because the right of eminent domain of the United States is superior to, and could not have been extinguished by, the statutes in question. Of necessity, however, the exercise of this power must be by the United States through Congress.

This power may be found in the direction given to the Federal Power Commission to issue a license to the Power Authority (71 Stat. 401) and the right granted to a licensee to use the right of eminent domain. Appellant challenges this approach by arguing (1) that the Federal Power Commission cannot thus usurp the authority of Congress and (2) that any taking of Tuscarora property must be by special enactment directed to Tuscarora land. General acts, the Tuscarora say, will not suffice.

There is no question that Congress has the constitutional authority to take Indian Reservation or tribal lands by eminent domain. *Cherokee National* v. *Southern Kansas Ry. Co.*, 135 U. S. 641. There remain to be determined whether in delegating its power of condemnation to the Power Authority, Congress expressly or impliedly intended to authorize the taking of Indian Reservation or tribal lands (as distinct from lands allotted to Indians in severalty, 2 U. S. C. A. 357); and whether in the course of its condemnation procedure the Power Authority complied with the pertinent provisions of the Federal Power Act.

Congress did not expressly authorize the taking of the appellant's land for the Niagara Power Project. Can it be inferred from the nature of the project and its proximity to the Reservation or from the impracticability of constructing it without taking a portion of the Tuscarora Reservation that Congress intended to authorize such a taking? *Western Union Telegraph Co.* v. *Pennsylvania Railroad Co. et al.*, 195 U. S. 540; *Spaulding* v. *Chandler*, 160 U. S. 394 (1895); *Seneca Nation of Indians* v. *Brucker*, U. S. District Court, District of Columbia, Civil No. 2202-57, dated March 24, 1958 (unreported), and cases cited therein. Such an inference may properly be drawn when consideration is given to the size and extent of the Niagara Power Project.

The electric plant will have a capacity of 2,190,000 kilowatts, the largest hydroelectric plant in the United States, and will produce annually some 13,000,000,000 kilowatt hours of energy. To accomplish this result a large storage reservoir is essential for the efficient use of the available water supply.

The legislative history of the Niagara River Hydroelectric Power Project, 85th Congress, First Session, 1957, Vol. 2, U. S. Congressional and Administrative News, pages 585, *et seq.*, shows that in the hearing before both

Houses of Congress, the redevelopment plan contemplated "a pump-storage plant at the top of Niagara escarpment 0.8 mile east of Lewiston, where water would be pumped during the night hours to a reservoir with surface area of 850 acres * * *." While this acreage is less than that now sought to be taken, it may be assumed that Congress had general knowledge of the terrain and the pertinent area and that appellant's Reservation was in the vicinity and likely to be taken in part for the purposes of the project.

The direction to the Federal Power Commission was specific, namely, "to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara Power permitted to be used by International agreement." The licensee by virtue of section 814 becomes vested with the governmental power of eminent domain. The exercise of the right is thus the act of an agency of the sovereign. But just as the grant is given by Congress it should be exercised in the manner prescribed by Congress which is either in the district court where the property is located or in the state courts. The appellees, although they started their condemnation proceedings in the State court, chose to abandon that method and proceeded under New York Public Authorities Law (specifically passed in 1958) and the New York Condemnation Law giving the Power Authority the right to proceed by appropriation under section 30 of the New York Highway Law. If Congress had intended this procedure to be followed, section 814 instead of providing "in the state courts" would have to read "or in such manner as may be prescribed by the legislature of the state in which the property is located." The specific 1958 legislation dealing with the Niagara River project enables the Power Authority to move in, appropriate the land and remove the owner before he has had a chance to have a judicial hearing. If Congress

wishes this to be the method of eviction it should at least so declare in specific terms.

The final question is, what relief should be granted? The construction workers are on the borders of the Reservation ready to install power lines and cover the land with fill for the reservoir dikes. Nevertheless, aggressive construction activity should not be sufficient to nullify the protective policy of the Government towards the Indians or the laws calculated to enforce that policy. The Congressional concern, exhibited as recently as 1950, to except the two elements most carefully guarded by the Government, namely, tax exemption and alienation, from transfer to the civil jurisdictional powers of the State of New York is ample evidence that "guardianship" still exists. If the Indians are no longer to be the wards of the United States such a change should be by Congressional enactment and not by court decision.

The court below dismissed the complaint thus preventing any relief by way of declaration of rights. This portion of the judgment should be reversed. Since the complaint seeks a declaration of rights we hold that the Power Authority of the State of New York as a licensee of the Federal Power Commission directed to issue a license pursuant to Public Law 85-159 (Act of August 21, 1957, 71 Stat. 401) is authorized to exercise the right of eminent domain according to the procedures specified in section 814 of the Federal Power Act (16 U. S. C. A. section 814).

Pending the final determination of this action or any proceeding seeking to acquire the property in question, appellees are stayed from entering upon or damaging lands within the Tuscarora Reservation except that appellees shall have the right to conduct, and continue with, such activities on said property as have been excluded from the stays heretofore entered as amended from time to time.

The proceedings taken to appropriate the property in question by the filing of maps, notices or other documents pursuant to the Highway Law and the Public Authorities Law of the State of New York are vacated and annulled.

The District Court, in the event that the Power Authority desires to exercise its right of eminent domain in that court, is requested to expedite all proceedings as much as possible.

Insofar as the judgment appealed from dismisses the complaint and denies a stay it is reversed.

Insofar as the decision below holds that the Power Authority has the right to exercise eminent domain it is affirmed.

The cross-appeal with reference to the affidavit of Henry S. Manley is affirmed. It is sufficient that the material therein contained be received within the limitations fixed by the court below.

The judgment should be modified in accordance with this opinion. No costs.

SWAN, *Circuit Judge* (dissenting):

I disagree with the majority opinion only in its holding that condemnation by appropriation pursuant to the state statutes is not permissible under §21 of the Federal Power Act and the license issued by the Commission. In my opinion the judgment should be affirmed. The reasons which have led me to this conclusion have not been persuasive to my brothers, and I refrain from stating them here in order to avoid delaying the decision of the court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 394—October Term, 1957

(Submitted August 6, 1958 Decided August 26, 1958)

Docket No. 25236

TUSCARORA NATION OF INDIANS, *Plaintiff-Appellant*,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, *et al.*, *Defendant-Appellees*.

Before:

SWAN and MOORE, *Circuit Judges* and
ANDERSON, *District Judge*.

On petition by appellant for rehearing; and motion by appellees for clarification or modification of the stay provisions of this court's judgment of July 24, 1958.

ARTHUR LAZARUS, JR., STRASSER, SPIEGELBERG, FRIED & FRANK, Washington, D. C., *Counsel for Appellant*. Of Counsel: Daniel M. Singer.

THOMAS F. MOORE, JR., *Attorney for Appellees*.

PER CURIAM:

The petition for rehearing is denied, and it is ordered that the mandate shall be issued six days after the date hereof.

Upon issuance of the mandate, the stay granted in the opinion of this court "pending final determination of this action" will cease. Consequently after issuance of the mandate the answer to each of the three questions raised in the motion for clarification is "No."

August 26, 1958

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil Action No. 7844

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION, *Plaintiff*

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES, and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON, *Defendants*

STRASSER, SPIEGELBERG, FRIED & FRANK (Arthur Lazarus Jr., Esq., of counsel), New York, New York, Attorneys for Plaintiff

THOMAS F. MOORE, JR., Esq., New York, New York, Attorney for Defendants Power Authority of the State of New York and Robert Moses

LOUIS J. LEFKOWITZ, Attorney General of the State of New York (Julius L. Sackman, Esq., of counsel), Albany, New York, Attorney for Defendant John W. Johnson

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The complaint in this action was filed in the Southern District of New York on April 19, 1958. The action is one for declaratory judgment, wherein the plaintiff prays

(1) That it have a judgment and decree of this court defining its rights and status therein, particularly adjudicating that neither of the defendants, nor any of them, had any right, authority or power to acquire, or attempt to acquire, by appropriation or otherwise, any or all of the lands belonging to plaintiff within the Tuscarora Reservation;

(2) That a temporary restraining order be granted restraining and enjoining the defendants and each of them and their agents, servants, employees and attorneys, and all persons in active concert and participation with them, from entering upon, or taking any action with regard to any appropriation of land belonging to the plaintiff within the Tuscarora Reservation;

(3) That a permanent injunction permanently granting the relief sought by the temporary restraining order be granted;

(4) That this court set aside, vacate and annul all descriptions, maps, notices and other instruments in connection with the purported appropriation.

The complaint alleges that plaintiff is a recognized tribe of American Indians residing on the Tuscarora Reservation in Niagara County, New York. The complaint further alleges the existence of an actual controversy "which is definite, concrete, real and substantial, which involves and affects the legal relations of plaintiff and defendants, and vitally affects the public interest." This action is brought under Sections 2201 and 2202, Title 28 U.S.C. and the complaint alleges jurisdiction by reason of Title 28 U.S.C., Section 1331. The plaintiff claims relief under Article I, Section 8, of the Federal Constitution, authorizing Congress to regulate commerce with the Indian tribes, and Treaties of October 22, 1784,[1] 7 Stat. 15, and

[1] Treaty between the United States and the Six Nations concluded at Fort Stanwix in 1784 and proclaimed October 22, 1784. 7 Stat. 15.

November 11, 1794,[2] 7 Stat. 44, entered into by the United States and the Six Nations of Indians including plaintiff, and R. S. Section 2116, 25 U.S.C. 177, and the Act of September 13, 1950, 25 U.S.C. 233, relating to the alienation of Indian lands.

The defendant Power Authority of the State of New York is a corporate instrumentality and a subdivision of the State of New York. The defendant Robert Moses is the Chairman of the Power Authority of the State of New York and the defendant John W. Johnson is the duly appointed and acting Superintendent of Public Works of the State of New York.

It further appears that Averell Harriman, Governor of the State of New York, on April 11, 1958 signed into law Chapter 646 of the Laws of 1958, amending paragraph 1 of Section 1007(10) of the Public Authorities Law, as follows:

> "The Authority may determine what real property is reasonably necessary for the improvement and development of the Niagara River or the International Rapids section of the St. Lawrence River. If funds are made available by the Authority to the State for payment of the cost and expense of the acquisition thereof, the Superintendent of Public Works, when requested by the Authority, shall acquire such real property in the name of the State by appropriation and, where necessary, remove the owner or occupant thereof and obtain possession, according to the procedure provided by Sec. 30 of the Highway Law, insofar as the same may be applicable. The Authority shall have the right to possess and use for its corporate purposes, so long as its corporate existence shall

[2] Treaty between the United States and the Six Nations concluded at Canandaigua in 1794 and proclaimed January 21, 1795. 7 Stat. 44.

continue, all such real property and rights in real property so acquired."

Acting under the amendment provided by Chapter 646 of the Laws of 1958 of the State of New York as above indicated, the Power Authority of the State of New York obtained, after a long and at times bitter contest before the Congress of the United States, the status of a licensee of the Federal Power Commission, an agency of the United States Congress, to which the latter had delegated its authority concerning water power and hydroelectric development. While this debate in the Congress of the United States was proceeding as to what agency, if any, would be the representative of the United States following its treaty with the Dominion of Canada in 1950, the Dominion of Canada proceeded immediately, and has created, and is now utilizing, a very modern and most valuable hydroelectric power system, the turbines of which generate power and have for some years past; parenthetically, following the destruction of the Niagara Mohawk plant (formerly the Niagara Power Company) on the American shore of the Niagara River, negotiations were entered into resulting in sale by the Dominion of Canada to the United States of power from this very new equipment. Thus, in the final legislation by the Congress, empowering the Power Authority of New York to proceed as a licensee of the Federal Power Commission, and in the State of New York legislation of 1958, germane to the issue of power, time was shown to be most important.

The plaintiff claims that the Power Authority, in its attempt to occupy lands of the plaintiff, is offending federal treaties and statutes and that the defendants have not requested, nor has the Congress of the United States granted, permission to acquire lands belonging to plaintiff. The plaintiff further alleges that the 1300 acres of land within the Tuscarora Reservation which defendants

have purported to appropriate is of a unique character to plaintiff; in that it has been occupied by the Tuscarora Nation for over 150 years; and is land upon which they hope and intend to live in the future. Plaintiff further alleges that in the event that an area of the Reservation is taken, it cannot acquire by purchase similar contiguous land by using the proceeds from the lands taken "since any newly acquired lands would not be part of plaintiff's community and would be alien to plaintiff's customs, traditions and history."

This is a novel argument in view of the fact that the 1300 acres was purchased by the antecedents of those constituting the Tribe of Tuscarora Indians with moneys obtained from the sale of lands originally owned by this Tribe in North Carolina. The plaintiff further contends that the unique character of the land on the reservation is in sharp contrast to all alternative land available to the defendants outside the reservation. This is of no avail, as many cases have determined this to be a legislative and not a judicial question.

A great deal of historical and legal material respecting Indian lands generally, and the land of this plaintiff in particular, has been submitted by the parties. The reservation of this plaintiff appears to be unique among Indian lands in New York. The records indicate that a few Tuscaroras settled at or near the present reservation as early as 1780,[2a] but the tribe does not appear to have acquired legal title to the present reservation lands until some 20 to 30 years later, between 1800 and 1810. In addition, none of plaintiff's land was ceded or allotted to it either by the United States or the State of New York. The land was acquired in three parcels, to wit: one parcel

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[2a] Turner, *The Pioneer History of the Holland Purchase of Western New York* (Buffalo: Geo. H. Derby & Co., 1849), pp. 182-3.

acquired by deed from the Seneca Nation;[3] a second parcel acquired by grant from the Holland Land Co.; and the third parcel acquired by purchase from the Holland Land Co.[4] It is from this third parcel of 4329 acres that defendant Power Authority wishes to take approximately 1300 acres of land to construct a reservoir. There is no dispute among the parties concerning the way in which plaintiff acquired the disputed tract.

Plaintiff claims the protection of the Treaties of Fort Stanwix, signed October 22, 1784, and the Pickering Treaty, signed November 11, 1794. In these treaties, the United States guaranteed the Six Nations peaceful possession of the land upon which they were settled. While these guarantees might conceivably apply to parts of parcel one or two, since some Tuscaroras appear to have settled therein between 1780 and 1795 even though title was not acquired until after 1800, they cannot apply to tract three, since the tribe did not settle therein until some time after 1804 and did not acquire title until 1809. It is not reasonable to interpret either treaty, in the absence of specific language so providing, to apply the guarantees contained therein to after-acquired lands. While such an interpretation might reasonably be made where the United States had ceded or alloted the after-acquired lands to plaintiff, such a result could never obtain where the after-acquired lands were purchased by plaintiff. In the latter eventuality, the only limit on the size of plaintiff's reservation would be the extent of its ability to purchase additional land. Certainly, it is not reasonable to assume that

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[3] Deed of Conveyance of 640 acres from Seneca Indians to Tuscarora Indians dated March 30, 1808, recorded in Liber 151, Pages 168-169, Niagara County Clerk's Office, Lockport, New York.

[4] Deed of Conveyance of 4,329 acres from Henry Dearborn Secretary of the War Department to Tuscarora Indians dated January 2, 1809, recorded in Liber A, Page 5, Niagara County Clerk's Office, Lockport, New York.

any of the parties to the treaties relied on by plaintiff had this result in mind.

The character of plaintiff's interest in the disputed land, and the location and control of the fee in that land, raises a two pronged problem. The first concerns the history of the specific fee involved, and the second, as mentioned previously, concerns the character of the fee in Indian lands generally.

The area in which plaintiff's land is located, originally came under the dominion of the British Crown. The area was granted to the colony of Massachusetts under a charter issued by King Charles I.[5] Apparently, the same area was granted to the colony of New York under a charter issued by King Charles II.[6] Following the signing of the peace treaty between the United States and Great Britain, which terminated the Revolutionary War, a dispute arose between the newly independent states of New York and Massachusetts as to ownership and control of the area, including plaintiff's reservation. The dispute was settled by the so-called "Hartford Compact of 1786",[7] by which the two states agreed that New York would have governmental control over what is now Western New York. The parties agreed inter alia to the drawing of a line running north-south from Lake Ontario along the westerly shore of Seneca Lake to the present New York-Pennsylvania border. East of this line, New York was recognized as having the pre-emption right in the land. West of this line, the same right was vested in Massachusetts. In

[5] The Charter of the Colony of Massachusetts Bay in New England, 1628-9 (N.Y. Leg. Doc. No. 51, 1889, pp. 94-100).

[6] Grant from the King of England to the Duke of York, dated March 12, 1664 (N.Y. Leg. Doc. No. 51, 1889, pp. 100-104).

[7] Hartford Compact between New York and Massachusetts concluded December 16, 1786, recorded in Liber 1, pages 270-280 of Miscellaneous Records in the Cattaraugus County Clerk's Office, Little Valley, New York (N.Y. Leg. Doc. No. 51, 1889, pp. 105-111).

1791 and 1792, Massachusetts, pursuant to the Hartford Compact, sold to Robert Morris all of its right title and interest, including "the right of pre-emption of the soil from the native Indians", to the area west of a line running generally north-south from Lake Ontario through Genesco to the New York-Pennsylvania border.[8] Morris then conveyed all of his right, title and interest in these lands to the Holland Land Company.[9] The deeds involved in effect required Morris to extinguish the Indian right of occupancy in the lands concerned, as a result of his covenant to remove all encumbrances. Pursuant to this covenant in 1797, Robert Morris entered into an agreement at Genesco, the so-called "Treaty of Big Tree",[10] at which the Seneca Nation transferred all of its right, title and interest to Morris for a valuable consideration. The agree-

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[8] Deed of Conveyance from the State of Massachusetts to Robert Morris dated May 11, 1791 (N.Y. Leg. Doc. No. 51, 1889, pp. 112-114).

Release and Conveyance by the State of Massachusetts to Robert Morris dated June 20, 1792 (N.Y. Leg. Doc. No. 51, 1889, pp. 115-116).

[9] Deed of Conveyance from Robert Morris to Herman LeRoy and John Lincklaen, agents for the "Holland Land Company", dated December 24, 1792 (N.Y. Leg. Doc. No. 51, 1889, pp. 117-120).

Deed of Conveyance from Robert Morris to Herman LeRoy, John Lincklaen and Gerrit Boon, agents for the "Holland Land Company", dated February 27, 1793 (N.Y. Leg. Doc. No. 51, 1889, pp. 121-123).

Deed of Conveyance from Robert Morris to Herman LeRoy, William Bayard and Matthew Clarkson, agents for the "Holland Land Company", dated July 20, 1793 (N.Y. Leg. Doc. No. 51, 1889, pp. 124-127).

Deed of Conveyance from Robert Morris to Herman LeRoy, John Lincklaen and Gerrit Boon, agents for the "Holland Land Company", dated July 20, 1793 (N.Y. Leg. Doc. No. 51, 1889, pp. 128-130).

[10] Agreement concluded between Robert Morris and the Seneca Indians at Big Tree (Genesco, New York) September 15, 1797 (N.Y. Leg. Doc. No. 51, 1889, pp. 131-134).

ment specifically reserved ten tracts of land to the Indians, not including any part of plaintiff's reservation. Some question has been raised as to whether or not the Seneca grant was left out of the treaty by inadvertence, as in the case of the Oil Springs Reservation, so that original title remained in the Seneca Nation.[11] It should be noted that a United States Commissioner, one Jeremiah Wadsworth, was present at the making of the agreement, as a result of which the United States appears to have acquiesced to the agreement. As a result of the treaty of "Big Tree", it appears that the deed of the Seneca Nation to the Tuscarora of 640 acres in 1808 was a nullity in that the Senecas had nothing to convey. The transfer was never objected to by the Holland Land Company, its successors or assigns. It might be noted that, in correspondence between Joseph Ellicott and Theop. Cazenove, both officers of the Holland Land Company, an intention was expressed to confirm the Seneca grant, but to reserve to the Holland Land Company the pre-emptive right.[12] No

A a result of the above, assuming the Seneca Nation possessed the right of original Indian occupancy, and no reason appears for assuming that the truth is otherwise, the original right of Indian occupancy and the pre-emptive right in the lands now occupied by plaintiff were actually extinguished by the treaty of "Big Tree". Some question might be raised as to whether or not this is so with regard to the Seneca grant on a formal basis, in view of the 1810 conveyance by the Holland Land Company of its pre-emptive rights in 1920 acres in the Tuscarora Reserva- formal action was taken in this regard until the company's conveyance in 1810 to David Ogden.

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[11] Royce, *Indian Land Cessions*, 18th Annual Report of the Bureau of American Ethnology, Part 2 (Washington: Government Printing Office, 1899), p. 773.

[12] Letter from Theophilus Cazenove to Joseph Ellicott, dated May 10, 1798 (32 Buffalo Historical Society Publication, pp. 21-30).

tion to David Ogden,[13] this acreage being equivalent to the Seneca grant and the Holland grant to the Tuscarora Reservation combined. This interest was later conveyed by the Ogden Land Company to others[14] in 1821, and presumably resides at present in the heirs or assigns of the said grantees. There does not appear to have been a conveyance of the pre-emptive right as such in the Tuscarora purchase subsequent to the treaty of "Big Tree." In any event, the present title to all of the land of plaintiff was acquired from grantees of the sovereign who possessed the pre-emptive right, and who had previously extinguished the original right of Indian occupancy. This right, once having been extinguished, could not be revived, even if title was thereafter acquired by those who originally possessed that right. The obvious policy of the sovereign was to extinguish the original Indian title to all but reserved Indian lands. Original Indian title was viewed as an encumbrance on land, rather than a legitimate general interest, since it could be held only by the original Indian tribes and it was the intention of the sovereign that Indians should be confined to specific tracts, and the state generally opened to white settlement. In view of this policy, it cannot be argued that original Indian title can in any manner be revived once it has been extinguished. Plaintiff here, of course, historically did not possess original Indian title in the lands which they now occupy. They hold title by deed and not by original right of Indian occupancy.

The foregoing is as brief a sketch as possible of the title to the specific land at issue. However, to determine

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[13] Deed of Conveyance from Holland Land Company to David A. Ogden, dated September 12, 1810, recorded at No. 1 of Deeds, page 68, Erie County Clerk's Office, Buffalo, New York.

[14] Deed of Conveyance from David Ogden to Robert Troup and others dated February 21, 1821, recorded in Liber One of Deeds at pp. 102-110, Cattaraugus County Clerk's Office, Little Valley, New York (N.Y. Leg. Doc. No. 51, 1889, pp. 172-181).

exactly what interest the plaintiff acquired when it acquired title, we must look to the general law regarding Indian lands. The basic statement of the legal character of such lands is to be found in the landmark opinion of Chief Justice John Marshall in *Johnson* v. *McIntosh*, 21 U.S. 542 at 583. The effect of this decision, which has been uniformly followed since its issuance in 1823, is to confirm in the Indian tribes merely a "right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it." In the earlier case of *Fletcher* v. *Peck*, 10 U.S. 87, Chief Justice Marshall said, with respect to lands within another of the thirteen colonies, to wit, Georgia, that the question whether vacant lands within the United States were joint property or belonged to the separate states had been compromised; that since the vacant land at issue therein was within the State of Georgia, that state had the power to grant it; and finally, that the nature of Indian title was such as not to be inconsistent with seizin in fee on the part of the state.

The reasoning found in the *Johnson* and *Fletcher* cases forms the basis for the view that in the thirteen original colonies the fee to all land within the state passed directly from the Crown to the sovereign state following the revolution; that the United States never had title to such lands, and that as the Indians had at best a mere right of occupancy, the fee to their lands resided in the state. This status is in contrast to that of all lands, and particularly Indian lands, outside the original thirteen colonies, which were federally owned before being divided into sovereign states. This view is succinctly set forth in *Seneca Nation of Indians* v. *Appleby*, 112 N.Y.S. 177 at 188-89, reversed on other grounds at 196 N.Y. 318; in *Seneca Nation* v. *Christie*, 126 N.Y. 122; *Jones Cut Stone* v. *State*, 166 N.Y.S. 2d 742, and in several reports and opinions of Congressional Committees and Attorneys General. See a report on the background and status of the New York

Indians submitted to the Speaker of the House of Representatives by the Department of the Interior on January 4, 1954.[15] See also *Dixon* v. *State*, 155 N.Y.S. 2d 723 and *St. Regis* v. *State*, 158 N.Y.S. 2d 540,, reversed on other grounds at 168 N.Y.S. 2d 894. Collateral support for this view is also found in the rules of law, basic in New York since the time of its inception, that original and ultimate property to all lands within the jurisdiction of the state resides in the people thereof (reflected today in New York Constitution, Art. I, Sec. 10); and that no sale of Indian lands may be made without legislative consent (N.Y. Const. Art I, Sec. 13). When Section 1007, Public Authorities Law of New York State was amended, a statement from the floor during the debate contained a direct quote showing knowledge by the Legislature that plaintiff's lands were involved. In view of this, the Legislature must be presumed to have consented to the taking. Even if this were not so, there appears to be authority for such a taking, irrespective of legislative approval. See *St. Regis* v. *State*, 168 N.Y.S. 2d 894 at 898-899.

As a result of the character of Indian title in New York, the provision of the Pickering Treaty which, if applicable, would apparently limit grantees of the Six Nations to "the people of the United States" (Art. 3), could not refer to the Federal Government only, since the Federal Government never possessed the fee or the pre-emptive right in New York Indian lands. Indeed, the Supreme Court, in The New York Indians, 72 U.S. 761, interpreted that treaty as meaning that the Indians could sell only to the party possessed of the right of pre-emption, although this had to be done with the consent of the government. The treaty of "Big Tree", which extinguished the Indians' original right to possession in the land in

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[15] Report entitled "Background Data on Indians of New York" transmitted by Assistant Secretary of the Interior Orme Lewis to the Speaker of the House of Representatives, January 4, 1954. Plaintiff's Exhibit 7.

issue, was acquiesced in by the United States. For this reason, that treaty also complied with the requirements of the first "Indian Non-Intercourse Act"[16] (1 Stat. 138), and also with the second "Non-Intercourse Act"[17] (1 Stat. 330). Furthermore, the character of the title to Indian lands in New York explains the holding in *Seneca Nation* v. *Christie*, supra, that New York had the power to make treaties with New York Indians for the purchase of their lands; and the holding in *United States* v. *Franklin County*, 50 F. Supp. 152, that the absence of a United States Commissioner at the making of such a treaty would not invalidate it. The character of that title also affords the basis for the holding that Indians in New York are wards of the State, and that fee to their lands resides in the State, as found in *Seneca Nation* v. *Christie*, supra; *Dixon* v. *State*, supra, and other decisions. In New York ex rel. Ray v. Martin, 326 U.S. 496 (1946), the most recent decision of the Supreme Court on the subject of the peculiar status of the New York Indian, it was held, at page 499, that the power of Congress to regulate commerce with the Indian tribes, derived under the same clause of the Constitution with the power to regulate interstate commerce, is of a similar nature, the court saying, "In the absence of a limiting treaty obligation or Congressional enactment, each state had a right to exercise jurisdiction over Indian reservations within its boundaries." Finally, there are innumerable examples of the extinguishment of Indian title in New York, some involving plaintiff's land, in which the United States took no part.[18] The state has, for ex-

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[16] Indian Non-Intercourse Act, July 22, 1790. 1 Stat. 138.

[17] Indian Non-Intercourse Act, March 1, 1793. 1 Stat. 330.

[18] Agreement between New York Telephone Company and Niagara Mohawk Power Corporation and Chief Harry Patterson, March 1, 1951. Defendant Power Authority Appendix, pp. 122a-123a.

Agreement between Niagara Mohawk Power Corporation and Harry Patterson, March 17, 1958. Defendant Power Authority Appendix, pp. 124a-125a.

ample, long exercised the power of eminent domain over Indian lands for highway and related projects. *Wadsworth* v. *Buffalo Hydraulic Assn.*, 16 Barb. 83.

As a result of the foregoing, it is clear that the disposition of the pre-emptive rights by Massachusetts to Robert Morris was proper; that Morris' extinguishment of the original Indian right to possession conformed with applicable Federal law, that plaintiff does not now, and never did, possess that right in the lands in dispute. Whatever interest the United States has in the New York Indians is directed not to Indian lands as such, but to something more vague and general, such as their general welfare.[19] In any event, it is not directed to the land in dispute, which was given reservation tatus by the New York Legislature, not by the United States.

The character of the interest of the United States effectively refutes the contention by plaintiff's attorney that since the Bureau of Indian Affairs had to approve his contract with plaintiff,[20] that the Congress therefore

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[19] Letter from Fred G. Aandahl, Assistant Secretary of the Interior to Henry Patterson, member of Council of Tuscarora Nation and owner by allotment of 500 acres of land declining under date of November 1, 1957 to aid the Tuscarora Nation in opposing the Authority's application then pending before the Federal Power Commission.

Order of Federal Power Commission—"As your reservation lands are under State jurisdiction this department is not in a position to present your case for you." This sentence was quoted by the Federal Power Commission in its order issued March 21, 1958, which denied the application of the Tuscarora Nation for a rehearing on its objection to the licensing of the Niagara project because the reservoir is to be located on part of its land.

Plaintiff's exhibit 10; Power Authority Appendix p. 149a. See also Report of Department of Interior, Plaintiff's exhibit 7 supra, and Plaintiff's exhibits 9A, 9B and 9C.

[20] Letter from Assistant Commissioner of the Bureau of Indian Affairs, Department of the Interior, to Messrs. Strasser, Spiegel-

intended to retain control over plaintiff's land. Control of the specific matter of attorneys' contracts is not at all consistent with the absence of exercise of Federal control over New York Indian lands.

Plaintiff's land is unique among Indian lands in New York, having been purchased, rather than granted or ceded by the government. Plaintiff holds record title to the lands in dispute, but the effect of that title has not been determined. The act of the Legislature in 1821, after several petitions by plaintiff, permitted plaintiff to hold its land nationally and extended to it a tax-free status, and other protections constituting reservation status. It may be claimed that this had the effect of vesting the fee in the state in return for the favored status granted.

Research reveals no previous decisions on either the ability of an Indian tribe to hold land in fee, if purchased, or the effect of giving purchased land reservation status. But that question need not be dealt with here. For it is clear that if the fee is in the state, it may be taken by the state. But if the fee is not in the state, then it is privately held. If privately held, the fee is subject to the power of eminent domain and just compensation for the taking, unless it falls within a category excluded by Federal law or the State Constitution. The plaintiff urges particularly Section 177 and Section 233 of Title 25 U.S.C.A., which was an amendment to the Indian Law becoming effective in September, 1952, and which the plaintiff claims excludes the alienation of lands in reservations in New York State. The Public Authorities Law,

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berg, Fried and Frank, Attorneys for Plaintiff, dated May 12, 1958. Plaintiff's Exhibit No. 8A.

Notice of approval of contract entered into by the Tuscarora Indian Nation and the law firm of Strasser, Spiegelberg, Fried and Frank, authorized by the Deputy Commissioner of the Bureau of Indian Affairs, Department of the Interior, dated April 17, 1958. Plaintiff's exhibit No. 8B.

Section 1007 of the State of New York, contemplates a right of eminent domain in the sovereign state as granted in Section 21 of the Federal Power Act, 16 U.S.C.A. Section 814. Moreover, the acquisition of property as taken by the State Power Authority is the method outlined in the State Highway Law of New York, Section 30. See 212 F. 2d 227. Under the Federal Power Act, as held in *Missouri v. Union Electric Light and Power Company*, 42 F. 2d 692, necessity for taking property under power of eminent domain is exclusively within the power of Congress to determine by direct enactment or delegation of its power to an office or board. Under this section, a licensee, such as the Power Authority of the State of New York, has a general power to take. See *Burnett v. Nebraska etc.* 147 Neb. 458 23 N.W. 2d 266; *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276.

There is no constitutional requirement that the appropriation now involved be specifically authorized by an Act of Congress. The Federal law urged as applicable by plaintiff has been examined above and found to present no bar to the exercise of eminent domain. The State Constitution has been examined, and, far from presenting a bar to public condemnation, discloses an intent by the state to exercise exclusive control over Indian lands in New York.

In addition, Section 233 of Title 25 U.S.C.A. in its reference to the alienation of Indian lands in New York meant merely that the general law of New York relating to the alienation of land should not, as a result of Sec. 233, be construed to apply to Indian lands, but rather that the peculiar nature of such lands (i.e. a mere possessory right in the Indian Nations), should continue to be recognized. If the Congress had intended to place an absolute restraint on the alienation of Indian lands in New York, or to assert an absolute paramount authority in the Congress over New York Indian lands, it would not have chosen so incon-

grnous and unlikely a time and place to do so. If such a violent departure from the long history of dealing with and treating Indian lands had been intended, the Congress would surely not have done so in so casual and off-handed a manner. The parties have adduced nothing, either by way of legislative history or legal interpretation, to indicate that such was the intent of Congress. The plaintiff alleges that further acts on the part of the Power Authority, pursuant to the statutes of the State of New York, would, except for the intervention of this court, "interfere with the effective discharge of vital functions of the Federal Government, will frustrate the powers conferred by the Constitution upon the Congress of the United States, and are unlawful and will cause irreparable damage to plaintiff, for which it has no adequate remedy at law."

(1) *Jurisdiction*—While this court does not feel that a wholly federal question is raised here, nor that the usual jurisdictional limits of this court are met by the parties herein, this court has not been able to find any authorization for an Indian Tribe or Nation to institute a suit in state court seeking the relief sought here. Solely because plaintiff would be without the right to seek its present remedy if it were not allowed to maintain this action, this court assumes jurisdiction of the action, and proceeds to a consideration on the merits. (Sec. 5 N.Y. Indian Law; *King* v. *Warner*, 137 N.Y.S. 2d 568; *Bailey* v. *Miller*, 143 N.Y.S. 2d 122)

(2) *Three Judge Court*—Regardless of the pleadings and memoranda of the parties as to whether a constitutional question is presented, it is for the court to determine whether or not a claim of unconstitutionality is a substantial one. (*Patterson* v. *Hardin*, 145 F. Supp. 299) The view of this court is that the question presented is merely one of construction of a state statute as applied to this plaintiff. Having already determined that no substantial federal question is technically presented, and for

the reasons set forth below under point 3, this court concludes that no substantial constitutional question is raised, and that defendant Power Authority's motion for a three judge court must be denied. See *Wreide* v. *Waterfront Commission of New York Harbor*, D.C.N.Y. 1955, 132 F. Supp. 166; *Howard* v. *Ladner*, D.C. Miss. 1953, 116 F. Supp. 783, remanded for dismissal 347 U.S. 910.

(3) *Propriety of Taking*—As a result of the above analysis of the history and character of plaintiff's interest in the Tuscarora Reservation, there is no adequate reason why the taking by defendants of the land in dispute should not be confirmed. The motion for a permanent injunction must be, and is, denied. The temporary restraining order hereinbefore granted by Palmieri, D.J. and modified by Sugarman, D.J., each in the Southern District of New York, is dissolved. Plaintiff's motion that the temporary restraining order be continued pending appeal to the Circuit Court is denied. Plaintiff's motion that the affidavit of Henry S. Manley be stricken as an affidavit and considered by the court as an additional brief on behalf of defendants is granted.

(4) *As to Just Compensation*—This court adopts the reasoning of Lambaise, J. in *St. Regis* v. *State*, 158 N.Y.S. 2d 540, wherein the court held that although an Indian tribe may not bring suit in New York except by statutory authority, Section 30 of the Highway Law "would be clearly unconstitutional where it made no provision for compensation to those whose private property is to be taken for public use. While payment need not precede the taking, the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation except the title to the property taken and the amount of damages which the owner may recover. *Litchfield* v. *Bond*, 186 N.Y. 66; *Sweet* v. *Rechel*, 159 U.S. 380." Neither Sec. 30 of the Highway Law nor Sec. 1007 of the Public Authorities Law set forth any

restriction or limitation "upon the legal status of the owner from whom the property is taken, and implicit therefor, if not explicit therein, is the right of an owner to have his day in court to prove his title or interest and to establish his damages." Though *St. Regis* v. *State*, supra, was reversed by the Appellate Division, Third Department, at 168 N.Y.S. 2d 894, the reversal appears to have been on other grounds. It is therefore the holding of this court that there is statutory authority for plaintiff herein to bring suit in the New York Court of Claims to determine the amount of just compensation for the taking herein, and that the Court of Claims is the proper forum for determining the question of compensation. The constitutional requirement of just compensation is met. A careful reading of the statute law, and the interpretation thereof by case law above cited, indicate that plaintiff has a right of action in the courts of the State of New York. Therefore, this court declines to accept jurisdiction of the question of compensation, or to impinge upon the jurisdiction of the New York courts, and leaves plaintiff to its state remedies in this respect. The complaint in this action is dismissed without costs. The above constitutes the findings of fact, conclusions of law and judgment of this court. The judgment is effective immediately. So ordered.

JUSTIN C. MORGAN
Justin C. Morgan
United States District Judge

Dated: June 24, 1958

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FILED
SEP 29 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 384

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

Petitioner,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES, and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The petitioner herein seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 24, 1958, as modified by order dated August 26, 1958.

The respondent, John W. Johnson, Superintendent of Public Works of the State of New York, has appealed from the same judgment pursuant to 28 U. S. Code § 1254(2) and a jurisdictional statement has been submitted to this Court.

In the jurisdictional statement it is demonstrated:*

* The demonstration will be amplified further on the argument in this Court if jurisdiction is noted.

(a) That the Indian Intercourse Act (25 U. S. Code § 177) and the Civil Jurisdiction Act (25 U. S. Code § 233) do not inhibit the exercise of the sovereign power of eminent domain by the State of New York;

(b) That the foregoing statutes could not, in any event, be held applicable to the State of New York without unconstitutionally impairing the State's sovereignty;

(c) That the procedural method utilized by the State in effecting the acquisition of title was not repugnant to any provision of the federal constitution or of a federal statute.

If this Court notes jurisdiction and if, thereafter, the above contentions of the State should be upheld by this Court, all of the arguments advanced by the petitioner in support of its application for a writ of certiorari are irrelevant and moot. The granting of the instant application for a writ of certiorari is inconsistent with the noting of jurisdiction of the State's appeal.

The petition for a writ of certiorari should be denied.

Albany, N. Y., September 26, 1958.

Respectfully submitted,

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Attorney for Respondent,
John W. Johnson, Superintendent
of Public Works of the State of
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BRIEF FOR RESPONDENTS POWER AUTHORITY OF THE STATE OF NEW YORK AND ROBERT MOSES IN OPPOSITION

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TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

Petitioner,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS POWER AUTHORITY OF THE STATE OF NEW YORK AND ROBERT MOSES IN OPPOSITION

Opinions

The opinion of the District Court is set forth in Appendix C to the Petition. The opinion of the Court of Appeals for the Second Circuit is set forth in Appendix A to the Petition; and that Court's order denying rehearing and modifying the stay provisions of its judgment is set forth in Appendix B to the Petition. The opinion and order of Mr. Justice Harlan on petitioner's application for stay of the mandate of the Court of Appeals is contained in Appendix A to this brief. None of these opinions or orders has been reported.

Jurisdiction

The grounds on which the jurisdiction of this Court is invoked are set forth in the petition.

Constitutional Provisions; Treaties, Statutes and Orders Involved

Involved on this application are:

1. The provisions of the United States Constitution, Article I, Section 8.

2. Treaty of October 22, 1784 between the United States and the Six Nations, 7 Stat. 15.

3. Treaty of November 11, 1794 between the United States and the Six Nations, 7 Stat. 44.

4. Public Law 85-159, 71 Stat. 401, 16 U. S. C. §§ 836, 836a.

5. Federal Power Act, Sections 3(1), 3(2), 4(e), 21, 313; 16 U. S. C. Sections 796(1), 796(2), 797, 814, 825*l*.

6. Act of July 22, 1790, 1 Stat. 137.

7. Act of March 1, 1793, 1 Stat. 329.

8. 25 U. S. C. Section 177, Act of June 30, 1834, 4 Stat. 724.

9. 25 U. S. C. Section 233, Act of September 13, 1950.

10. New York Public Authorities Law, Sections 1007, 1008.

11. New York Highway Law, Section 30.

12. Order of the Federal Power Commission issued January 30, 1958, licensing Project No. 2216.

13. Order of the Federal Power Commission issued March 21, 1958 denying petitioner's application for rehearing on the January 30th order.

14. Order of the Federal Power Commission issued May 5, 1958, approving "Exhibit J" of the license application.

The most pertinent parts are set forth in Appendix B of this brief.

Questions Presented

1. Should condemnation pursuant to a declaratory judgment of the Court of Appeals, Second Circuit, entered in this action brought by petitioner, of land necessary for the Niagara Power Project, the construction of which has been mandated by Congress and declared by Congress to be of an emergency character, be stayed pending the redetermination of the issues in this action by the District of Columbia Circuit in a proceeding to review an order of the Federal Power Commission granting the license for the Project (which in no event aggrieved petitioner), the petition for review having been filed after the commencement of this action and the certified transcript of the record upon which the Commission's order was based having been filed with the Court of Appeals for the District of Columbia after the District Court entered judgment in this action?

2. Has respondent, Power Authority of the State of New York, a licensee of the Federal Power Commission and a corporate municipal instrumentality and political subdivision of the State of New York, the right to acquire, by the exercise of the right of eminent domain for public use in connection with its Niagara River Power Project lands owned in fee by petitioner as a result of purchase from non-Indian, non-governmental owners?

Statement

The petition for certiorari makes it clear that what is primarily sought is not a review of the judgment below on the merits, but rather a further stay of proceedings for the condemnation of petitioner's lands which are vitally and urgently needed for the Niagara Power Project. This being within the Court's discretion, we deem it necessary to apprise the Court at some length of the history of the litigations between petitioner and respondents and of the practical situation involving the construction of the power project, including the consequences which will ensue from further delay in the availability of petitioner's lands.

The facts which we shall summarize here are presented in detail in documents which are included in the record below.

Public Law 85-159, 16 U. S. C. § 836, was enacted August 21, 1957. It mandated the Federal Power Commission to issue a license to respondent Power Authority of the State of New York for a power project capable of utilizing all the water of the Niagara River available to the United States by international agreement. It directed that the license be issued pursuant to the Federal Power Act but that it contain conditions prescribed in the enabling statute, one of which requires that power be sold at the lowest price reasonably possible.

The 1957 legislation ended a dispute in Congress with respect to what entity should build the project which had been carried on since the negotiation of the 1950 Treaty with Canada (1 U. S. T. 694; T. I. A. S. No. 2130) making additional water of the Niagara available for power purposes. In recommending the 1957 legislation the Public Works Committees of both Houses of Congress indicated that they were doing so because of the grave emergency which confronted the Niagara Frontier because of the destruction on June 7, 1956 of a huge generating plant of the Niagara Mohawk Power Corporation which had theretofore used a good part of the Niagara water to produce power essential to the electrometallurgical and electrochemical industries upon which the whole economy of the area is based and which are vital to the defense of the country (Sen. Report 539, 85th Cong. 1st Sess.; H. R. No. 862, 85th Cong. 1st Sess.). Congress had before it the Power Authority's plan of development for the largest hydroelectric power project in the United States with an installed capacity of 2,190,000 kilowatts. Because the 1950 Treaty requires that more water be allowed to go over the Falls for scenic purposes in the daytime than at night during the long tourist season and therefore makes more water available for power purposes at night, a reservoir of 60,000 acre feet is necessary to store water nights and weekends when there is least demand for power for use

during the day five days a week when power is most needed. Without such a reservoir full practical use could not be made of all the water available to the United States and only about half the power potential could be realized. Such a reservoir will cover approximately 2,600 acres of land.*

As the Senate Report points out, by using the reservoir the project will have a firm capacity of 1,800,000 kilowatts and will produce about 13,000,000,000 kilowatt hours of energy annually. The total cost of the project will be about $700,000,000 which must be raised through the sale of bonds by the Power Authority which is a "corporate municipal instrumentality" and a "political subdivision of the state, exercising governmental and public powers" but has no State or Federal credit. The sole security behind the bonds will be revenue from the sale of power.

The Authority has borrowed $100,000,000 from banks in anticipation of an initial bond issue of $200,000,000 now being prepared for offering to the market. It has let contracts for construction work and equipment totalling nearly $400,000,000. Work is now in progress and the integrated schedule, each part of which depends upon each other part, calls for the production of power in February, 1961. Each day's delay in completion will add about $72,000 to the cost of the project because of interest charges during construction alone. Serious delay will result unless possession of petitioner's land is obtained in October. (R. 79, 80, 82-86)

The Federal Power Commission issued a preliminary license in September, 1957, but thereafter in a series of hearings entertained objections on the part of the Town of Lewiston and petitioner with respect to the size and location of the storage reservoir. The Town demanded that the reservoir be made smaller than planned and petitioner demanded that the Commission direct that no part

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* The statement in the House Report quoted in the opinion of the Court of Appeals below to the effect that the reservoir will have a surface area of 850 acres was a clerical error. Material furnished to both Houses indicated that the reservoir would be of the larger size.

of its land be taken for project purposes. Petitioner claimed that treaties barred the taking. Members of the Tuscarora Nation appeared and testified. The Nation formally intervened in the proceeding and filed a brief through its present counsel.

Petitioner's reservation is in the Town of Lewiston on the outskirts of the City of Niagara Falls, New York, near the Niagara River. It consists of three separate parcels aggregating about ten square miles (6,249 acres) and is inhabited by about 700 people of whom about 540 are members of the Nation.

The Western New York area in which the Niagara Power Project and petitioner's lands are included was claimed and held by the Seneca Indians from the middle of the seventeenth century until after the Revolution (*Seneca Nation* v. *Christie*, 126 N. Y. 122 (1891)). The Tuscarora Indians emigrated from North Carolina to Central New York beginning about 1714 and lived there with the Oneidas. In 1781, or a few years thereafter, a very small number of them who were adherents of the British squatted on the northeast corner of their present reservation (Parcel A, Map, centerfold), by sufference of the Senecas. Others joined them, so that by 1797, about 300 lived there. By that time the Senecas had sold the Indian right of occupancy in the area to the Holland Land Company, owner of the right of preemption as grantee of Robert Morris, who in turn was grantee of Massachusetts, which under the 1786 Hartford Compromise between Massachusetts and New York was conceded to have obtained such preemptive right as successor to the King of England. The sale by the Senecas was in conformity with the 1794 Treaty of Canandaigua or Pickering Treaty (7 Stat. 44) and was made under the auspices of the United States.

Despite the sale in 1797 at what is known as the "Treaty of Big Tree", the Holland Land Company permitted the Tuscaroras to continue to occupy the original square mile upon which they had settled and two additional square miles upon which they had spilled over (Parcel B, Map,

centerfold). There was no formal conveyance but the Company and its grantees have ever since recognized this right of occupancy. Later the Senecas gave the Tuscaroras what purported to be a deed to one of the three square miles.

In 1804 the Tuscaroras purchased an additional 4,329 acres from the Holland Land Company (Parcel C, Map, centerfold). The purchase was made with money which they obtained from the sale of lands in which they still had rights in North Carolina. This interstate transaction was carried out through the good offices of Henry Dearborn, Secretary of War. The Company deeded fee title to the land to Dearborn in trust for the Tuscarora Nation under an arrangement by which he was to reconvey it to the Tuscaroras when the full purchase price had been paid. This was done in 1809 and since that time the Nation has held fee title to the land. When Dearborn sent the deed to the Nation, he advised that it would be well for them to petition the Legislature of the State of New York for authority "to hold their lands in a national capacity." The newly-acquired lands were taxed for several years, although Parcels A and B were not. In 1820 the Nation petitioned the New York Legislature for relief from taxes on Parcel C and by Chapter 146 of the Laws of 1821 such exemption was granted by the State.

The 1,383 acres of land sought by the Power Authority is solely within this purchased Parcel C (Map, centerfold).

The 1784 Treaty of Fort Stanwix (7 Stat. 15) and the 1794 Treaty of Canandaigua (7 Stat. 44) had covered this land. The 1794 Treaty superseded the 1784 Treaty with respect to it and the force of the 1794 Treaty, by its terms, was spent upon the sale by the Senecas of their rights of occupancy in 1797. Hence, there is no treaty which applies to the land which is the subject of this action.

At the time of the Commission hearings the lands which the Authority planned to use for the project features, including the reservoir, were shown on a tentative "Exhibit J" to its application for a license which had been

prepared without the benefit of surveys. This Exhibit was put in evidence at the hearing (Matter of Power Authority of the State of New York, Project No. 2216, Tr. 617-618) and indicated that approximately half the reservoir would be on petitioner's land, some of it on Parcels A and B, but the bulk of it on Parcel C (Map, centerfold).

On January 30, 1958 the Commission made an order issuing a license (which superseded the preliminary September license) to the Authority and approving its general plan for the reservoir. The Commission ordered that the reservoir have a capacity of 60,000 acre feet and an area of about 2600 acres, but refused to pass on the question of whether or not any of petitioner's lands could be taken. It observed that "[t]he lands of the Indian nation are almost entirely undeveloped except for agricultural use" and took the position that "other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive." (Appendix, p. 12a).

There was nothing in the record before the Commission to show how much more expensive alternative lands would be or to show the impracticability of moving the reservoir due to the contour of the earth in one direction and the existence of a populated community in the other. (*cf.* Record in Court of Appeals, 212).

The order prescribed that a later determination would be made of what lands were to be included in the project and directed Authority to file with the Commission for approval at a later date revised exhibits including a revised "Exhibit J" showing the precise lands to be taken.

On March 21, 1958 the Commission entered an order denying an application made by petitioner for rehearing on the January 30, 1958 order and again refused to direct that petitioner's land be excluded from the project, stating that while the best location for the reservoir required some of petitioner's land, the question of its availability was for a court and not for the Commission to decide, and was one on which the Commission was not required "to render an advisory opinion." In this order the Commis-

sion also overruled a contention which petitioner had made for the first time in its application for rehearing, to the effect that the Commission in issuing the license had failed to follow procedures contained in Section 4(e) of the Federal Power Act with respect to use of a reservation of the United States. The Commission held that petitioner's lands are not part of a "reservation", as the term is defined in Section 3(2) of the Act.

On May 1, 1958 the Authority submitted to the Commission a revised "Exhibit J" to its application. (Appendix C). This revised exhibit showed that the reservoir would be located in such a way as to take in the 1,383 acres of petitioner's Parcel C which are the subject of this action. This was somewhat more Indian land than was shown on the previous "Exhibit J" which had been before the Commission when it had held its hearings and issued its January 30 order. The revised exhibit showed that no land would be taken from Parcels A and B, as had previously been planned (Map, centerfold). Rather, the only Tuscarora land to be taken would be a portion of Parcel C which could not conceivably be held to be covered by any Treaty.

On May 5 the Commission entered an order approving the revised "Exhibit J" and served a copy of that order on petitioner together with notice that it would become effective in 30 days unless a rehearing was demanded within that time. Under Section 313(b) of the Federal Power Act (16 U. S. C. § 825 *l* (b)), timely request for rehearing is a condition precedent for review by the Court of Appeals.

On May 16 petitioner filed with the United States Court of Appeals for the District of Columbia a petition to review the Commission's order of January 30. It did not, however, request rehearing of the May 5 order and has thus waived its right to obtain a review of that order.

The petition filed with the District of Columbia Circuit asked review of the January 30 order pursuant to Section 313(b) of the Federal Power Act, 16 U. S. C. § 825 *l* (b) on the alleged grounds that (1) the Commission did not have power to authorize use of petitioner's lands for the project;

(2) the Power Authority lacks power to acquire such lands "without specific permission from Congress, which permission has not been requested or granted and which cannot be secured through an order of the Commission"; and (3) the January 30 order was defective in its failure to contain findings required by Section 4 (e) of the Federal Power Act, 16 U. S. C. § 797(e) to be made when the Commission issues licenses for projects in reservations as defined in Section 3(2) of the Federal Power Act, 16 U. S. C. § 796(2).

On June 25, 1958 the Commission certified and filed with the Court of Appeals for the District of Columbia a transcript of the record upon which the orders of January 30 and March 21 were based.

In the meantime petitioner had commenced this action on April 18, 1958 and judgment dismissing the complaint had actually been entered in the United States District Court for the Western District of New York, Morgan, J., on June 24, 1958.

This action was brought (1) permanently to enjoin respondents from "taking any actions" to acquire by appropriation (a method of exercising the right of eminent domain under the laws of New York) lands belonging to petitioner, or from entering upon such lands; (2) for a declaratory judgment that respondents have no right, authority or power to acquire "by appropriation or otherwise" any lands belonging to petitioner; and (3) for an order setting aside and vacating all descriptions, maps, notices and other instruments "in connection with the purported appropriation" of petitioner's property.

The complaint states that the action is based upon Section 8 of Article I of the United States Constitution; the Treaty of October 22, 1784 between the United States and the Six Nations, 7 Stat. 15; the Treaty of November 11, 1794 between the United States and the Six Nations, 7 Stat. 44; 25 U. S. C. § 177, Act of June 30, 1834, § 12; and 25 U. S. C. § 233, Act of September 13, 1950.

Prior to the commencement of the action, the State of New York, acting through respondent John W. Johnson,

its Superintendent of Public Works, and on behalf of respondent Power Authority of the State of New York had filed with the Clerk of Niagara County, who is also the Clerk of the Supreme Court and the County Court of that county, a map and description of the property which is the subject of this action. It did so for the purpose of exercising the power of eminent domain granted to the Authority as a licensee of the Federal Power Commission by Section 21 of the Federal Power Act (16 U. S. C. § 814) and in compliance with Section 1007 subdivision 10 of the New York Public Authorities Law and Section 30 of the New York Highway Law. The state statutes provide that such action has the effect of vesting title to the land in the State for the use of the Authority. Other procedural steps necessary to complete the appropriation, preliminary to an award of damages by the New York Court of Claims and the transferring of possession through other court proceedings, had not been taken.*

These steps to acquire the land by exercise of the right of eminent domain were taken to provide the site for the storage reservoir, relocated transmission lines and relocated highways, and to make possible the diversion of creeks partly on the land in question, all of which is necessary in connection with Power Authority's Niagara River Power Project.

On June 24, 1958 the United States District Court, Western District of New York (Morgan, J.) dismissed petitioner's complaint, denied petitioner's motion for a permanent injunction, dismissed the temporary restraining order which had been issued against the Power Authority's entry upon the lands involved except for limited purposes of surveying and testing, and denied a motion for a further restraining order pending appeal.

Petitioner obtained a reinstatement of the previous stay with minor modifications from the Court of Appeals and

* The statement in the opinion of Moore, J., in the Court of Appeals (last full sentence on page 17a of Appendix A to petition) describing the appropriation method, was based on a factual misunderstanding of the method.

on July 24 that Court unanimously affirmed the decision of the District Court in so far as it held that the Power Authority has the right to exercise eminent domain over petitioner's land pursuant to Section 21 of the Federal Power Act. It entered a declaratory judgment to that effect. However, with Judge Swan dissenting, it reversed the dismissal of the complaint and set aside the documents used by the State to effect appropriation of the land on the ground that the State appropriation procedure is not one which may be used under Section 21 which provides for the exercise of eminent domain in Federal or State Courts. It requested the District Court in the event a condemnation proceeding were started there to expedite proceedings as much as possible.

The judgment continued the stay previously granted pending "the final determination of this action or any proceeding seeking to acquire the property in question". The Power Authority immediately commenced a condemnation action which is now pending in the District Court for the Western District of New York.

In its brief before the Court of Appeals petitioner had argued that the Power Authority could not take its lands pursuant to Section 21 of the Federal Power Act because the license was void for failure of the Commission to make the findings which Section 4(e) of the Federal Power Act requires to be made when licenses are issued on "reservations". On petition for rehearing of the Court of Appeals' judgment, petitioner for the first time contended that since the validity of the Authority's license with respect to its lands was before the Court of Appeals for the District of Columbia, as a matter of comity the validity of the license should not be assumed by the Second Circuit in advance of a decision by the District of Columbia Circuit, on the theory that the latter has exclusive jurisdiction to affirm, modify or set aside such order in whole or in part (16 U. S. C. § 825*l*(b)).

On August 27, the Second Circuit denied petitioner's petition for rehearing, and, on the basis of a motion made

by the Authority for clarification of the stay provisions of its judgment, ordered that its mandate issue in six days at which time the stay previously granted would cease. In so doing, the Court denied a request contained in the petition for rehearing that the Court withdraw its holding that the Authority was "validly authorized by the Federal Power Commission to exercise the power of eminent domain against appellant's lands, and retain jurisdiction" pending decision by the District of Columbia Circuit in the case pending there.* It also denied petitioner's request that it stay its mandate for ninety days to permit the filing of a petition for certiorari.

Petitioner thereupon sought a stay of the Court of Appeals mandate from Mr. Justice Harlan of this Court pending decision on petition for certiorari. On September 8 Mr. Justice Harlan denied a stay of the mandate but in effect stayed condemnation proceedings in the District Court except with respect to land immediately necessary for the building of transmission lines.

On September 15 the District Court for the Western District of New York, Burke, J., granted the Power Authority's motion for immediate possession of approximately 85.6 acres of petitioner's land for the purpose of erecting the transmission lines.

In the meantime on September 3, 1958, respondent, John W. Johnson, Superintendent of Public Works of the State of New York, appealed to this Court from the judgment of the Court of Appeals in this action in so far as it vacated and annulled the title of the State to the lands involved. The appeal was taken pursuant to 28 U. S. C. § 1254(2).

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*On September 17 the Power Authority moved the District of Columbia Circuit to speed up the brief schedule previously set, pursuant to a motion to which it was not a party, under which petitioner had until November 15 to serve its reply brief. Petitioner objected to advancing that date even though the Commission agreed to file its brief on September 29. However, the Court did establish a new briefing schedule and set the case down for hearing on October 28.

I

There is No Merit to Petitioner's Contention that Comity and the Orderly Administration of the Courts Require a Remand of the Case to the District Court with a Stay of Proceedings Pending a Final Decision of the Court of Appeals for the District of Columbia Circuit in a Proceeding Brought by Petitioner to Review the Federal Power Commission's Order of January 30, 1958.

The public interest demands that the Niagara Power Project be completed as soon as possible. Any further delay in the Power Authority's obtaining possession of petitioner's land will subject it to claims from contractors and absolve them from performing their work within the time limits set up in their contracts. Each day's delay in the completion of the project will add materially to its cost and will result in losses to the power-users of the Niagara area of upwards of $100,000 a day. They include the electrochemical and metallurgical industries which, by the direction of Congress (Act of August 21, 1957, 71 Stat. 401), are entitled to a large part of the power output, are vital to the defense of the country and employ virtually all of the industrial workers in the Niagara area; and the municipalities, rural cooperatives and defense agencies to whom Congress gave preference with respect to half the power. (R. 78-86; Record in Court of Appeals 208-215; 216-228; 242)

Petitioner suggests that "scrupulous regard 'for the smooth working of the federal judiciary'" should cause this Court to stay proceedings for the acquisition of petitioner's lands and thus delay the project until a decision of the Court of Appeals for the District of Columbia Circuit in the proceeding brought by petitioner to review the Commission's order of January 30, 1958.

It further suggests that the results of the decision of the Court of Appeals below are "chaotic."

The present procedural situation was brought about by the deliberate acts of petitioner. It delayed—as it conced-

edly had a strictly legal right to do—taking every step which it took to obtain review of Federal Power Commission orders until almost the last moment allowed by law; it failed to seek any review whatever of the one Power Commission order which actually aggrieved it; and when it had a choice of the District of Columbia Circuit and the Second Circuit Court of Appeals, it elected to bring a review proceeding in the District of Columbia despite the fact that it had already commenced an action involving the same issues in a District Court included in the Second Circuit. As late as September 18 it opposed advancing the time for briefs and hearing in the review proceeding.

We deem these facts relevant because that part of petitioner's application which requests a stay is addressed to the discretion of this Court. Also relevant is the fact that the pendency of litigation is interfering with the orderly financing of the Project.

In any event, the application for a stay based on the review proceeding should be dismissed for the reasons which follow.

1. The judgment below holding that respondent is empowered to acquire petitioner's land by eminent domain was validly rendered by a court of competent jurisdiction.

When this action was brought in the District Court, an actual controversy existed between the parties, and plaintiff (petitioner herein) alleged in the complaint that the action was based upon the Constitution, treaties and statutes of the United States. Included in the relief sought was a declaratory judgment that the Power Authority had no right "to acquire by appropriation or otherwise" any lands belonging to plaintiff. At the time the action was brought, petitioner had taken no steps to review any order of the Federal Power Commission.

The District Court clearly had jurisdiction (28 U. S. C. § 1331) and the power to render a declaratory judgment (Rule 57 of the Federal Rules of Civil Procedure; 28 U. S. C. §§ 2201, 2202).

Before entertaining motions by defendants for summary judgment and dismissal of the complaint in this action Judge Morgan asked counsel to submit memoranda on the question of the jurisdiction of the District Court. On May 19, 1958, three days after the filing of the petition to review in the District of Columbia Circuit, counsel for plaintiff (petitioner here), submitted a memorandum sustaining the proposition that the District Court had jurisdiction pursuant to 28 U. S. C. § 1331.

Not only was the petition for review of the January 30 order of the Commission filed after this action had been commenced and issue joined in the District Court, but judgment was rendered in the District Court on June 24, the day before the Commission certified and filed with the Court of Appeals for the District of Columbia Circuit a transcript of the record upon which the orders of January 30 and March 21 were based.

Prior to the enactment of Public Law 85-791, 85th Cong. H. R. 6788 (72 Stat. 947) on August 28, 1958, Section 313(b) of the Federal Power Act provided:

> "(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. *Upon the filing of such a transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part.* * * *" (Emphasis added)

The August 28 amendment provided:

> "(b) The second and third sentences of subsection (b) of section 313 of the Federal Power Act, as amended (49 Stat. 860), are amended to read as follows: 'A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. *Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.*'" (Emphasis added)

The amendment makes it clear that under the prior statute, applicable to this action, the District of Columbia Court of Appeals could not obtain any jurisdiction, exclusive or otherwise, until the transcript of the Commission's record was certified and filed with the Court. It is only since the amendment that the Court of Appeals obtains any jurisdiction upon the filing of the petition. It still does not acquire *exclusive* jurisdiction until the filing of the transcript.

The District Court's jurisdiction was determined at the time the action was begun and was not affected by subsequent events. *Smith v. Sperling*, 354 U. S. 91 (1957); *Minneapolis & St. Louis Railroad Co.* v. *Peoria & Pekin Union Railway Co.*, 270 U. S. 580 (1926); *Mullen* v. *Torrance*, 9 Wheat. 537 (1824); *Mutual Life Insurance Co.* v. *Blair*, 130 Fed. 971 (E. D. Mo. 1904); *Ritchie* v. *Burke*, 109 Fed. 16 (N. D. Ohio 1901); *Ex parte Kyle*, 67 Fed. 306 (W. D. Ark. 1895). However, even if such certification and filing could have deprived the District Court of jurisdiction in this action had they occurred before judgment, they certainly could not do so after judgment was duly entered; for judgment was entered at a time when the District of Columbia Court had no jurisdiction whatever.

The facts in this case are completely opposite to the facts in *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S.

320 (1958), where the judgment of the Court of Appeals on review of the Commission's order was *res judicata* when the second action was begun.

Here it is clear that the courts below had jurisdiction and were not divested of it.

2. The judgment below is *res judicata* on all issues which were or could have been there litigated.

As stated on page 9, *supra*, petitioner has asked the District of Columbia Circuit to review the January 30 and March 21 orders of the Commission on the alleged grounds that the Commission did not have power to authorize use of petitioner's land, that the Power Authority cannot acquire it and that the January 30 order was defective because of its failure to contain findings required by Section 4(e) of the Federal Power Act in the case of reservations of the United States.

The courts below, of course, adjudicated the Authority's right to take petitioner's land and therefore the Commission's right to license it to do so.

At the hearings on the motions which led to a dismissal of the complaint in the District Court plaintiff (petitioner here) argued that the Power Authority could not take its land pursuant to Section 21 of the Federal Power Act. It repeated this argument in the Court of Appeals and its brief there shows that it based the argument specifically on the ground that its lands constituted a reservation of the United States within the meaning of Sections 3(2) and 4(e) of the Federal Power Act and the Commission had failed to make the procedural finding required by Section 4(e).

Thus petitioner raised and had adjudicated in the District Court and Second Circuit Court of Appeals the very questions upon which it seeks review in the Court of Appeals for the District of Columbia Circuit. The courts below necessarily determined that the contentions had no validity.

The courts below did not purport to pass upon the validity of the Power Authority's license as such nor were they called upon to do so. They did, however, pass upon the only issues upon which review has been sought in the Court of Appeals for the District of Columbia Circuit. Therefore, since the courts below had jurisdiction their determination on those issues is *res judicata* unless reversed by this Court.

3. Even if the judgment below were not *res judicata* on all issues raised in the review proceeding, the stay should nevertheless be denied because the January 30 order of which review is sought in the Court of Appeals did not aggrieve petitioner and therefore the review proceeding must be dismissed on that ground.

As stated on page 8, *supra*, the Commission in its January 30 order licensing the Niagara Project, directed that the project's reservoir have a capacity of 60,000 acre feet but refused to pass on the question of whether any of petitioner's land should be included in the Project. It directed that the boundaries of the project be determined later.

In denying the petition for rehearing on March 21, the Commission again refused affirmatively to decide whether or not petitioner's lands could be taken for the project, stating the Authority's right to acquire the lands constituted a question to be resolved by a court of competent jurisdiction, and was one on which it was not called to render an advisory opinion.

On May 5, the Commission approved a revised "Exhibit J" to the Authority's application for a license showing that the Project would include the very land which is the subject of this action, this land being considerably greater in amount and partly in a different location than planned at the time of the hearings which led to the January 30 order.

Although petitioner was served with the May 5 order and was given thirty days in which to apply for rehearing on it, no rehearing was requested, and a court review of it

is therefore barred by the terms of Section 313(b) of the Federal Power Act.

It is clear that petitioner was not aggrieved by the January 30 order of which it seeks review in the District of Columbia Circuit. In fact, in applying for rehearing of that order, its only claim of being aggrieved was that it was

> "aggrieved by the order of January 30, 1958, by the mere fact that its property may be included in the Niagara Project."

It stated:

> "* * * even though the Commission apparently sought to avoid that result, issuance of the license may be construed as giving Federal consent to the acquisition of Petitioner's lands * * * particularly in the light of Section 21 of the Federal Power Act, * * *"

If petitioner was aggrieved it was by the May 5 order, which is not before the District of Columbia Circuit.

The order of the Federal Power Commission under consideration is not one of which the petitioner has standing to prosecute a review under Section 313(b). It is well settled that not everyone who appears before the Commission in a hearing which results in an order is entitled to have that order reviewed under 313(b). Interlocutory orders are of course beyond review. *Aluminum Company of America* v. *Federal Power Commission*, 130 F. 2d 445, 450 (D. C. Cir. 1942). Nor is an order which merely suggests action within its purview. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375 (1938). It must be a definitive adjudication changing a petitioner's present or future status. *Magnolia Petroleum Co.* v. *Federal Power Commission*, 236 F. 2d 785 (5th Cir. 1956), which dealt with an identical review provision in the Natural Gas Act. Moreover, even a finding of the Commission (not the present case) is beyond review unless an order is issued based on the finding. *Carolina Aluminum Co.* v. *Federal Power Commission*, 97 F. 2d 435, 436 (4th Cir. 1938).

4. Even if the judgment below is not *res judicata* on all issues now before the District of Columbia Circuit and even if petitioner were found to have standing to bring the review proceeding, the only question properly subject to review is the Commission's refusal to impose a condition in the license affirmatively excluding petitioner's lands from the project; and the Commission was under no legal compulsion to impose any such condition. Moreover the question was rendered moot by the Commission's Order of May 5.

In applying for rehearing on the January 30 order, the only objection made by petitioner to the order was its failure to "exclude the lands of the Tuscarora Indians" from the scope of the license and the only relief sought was such exclusion.

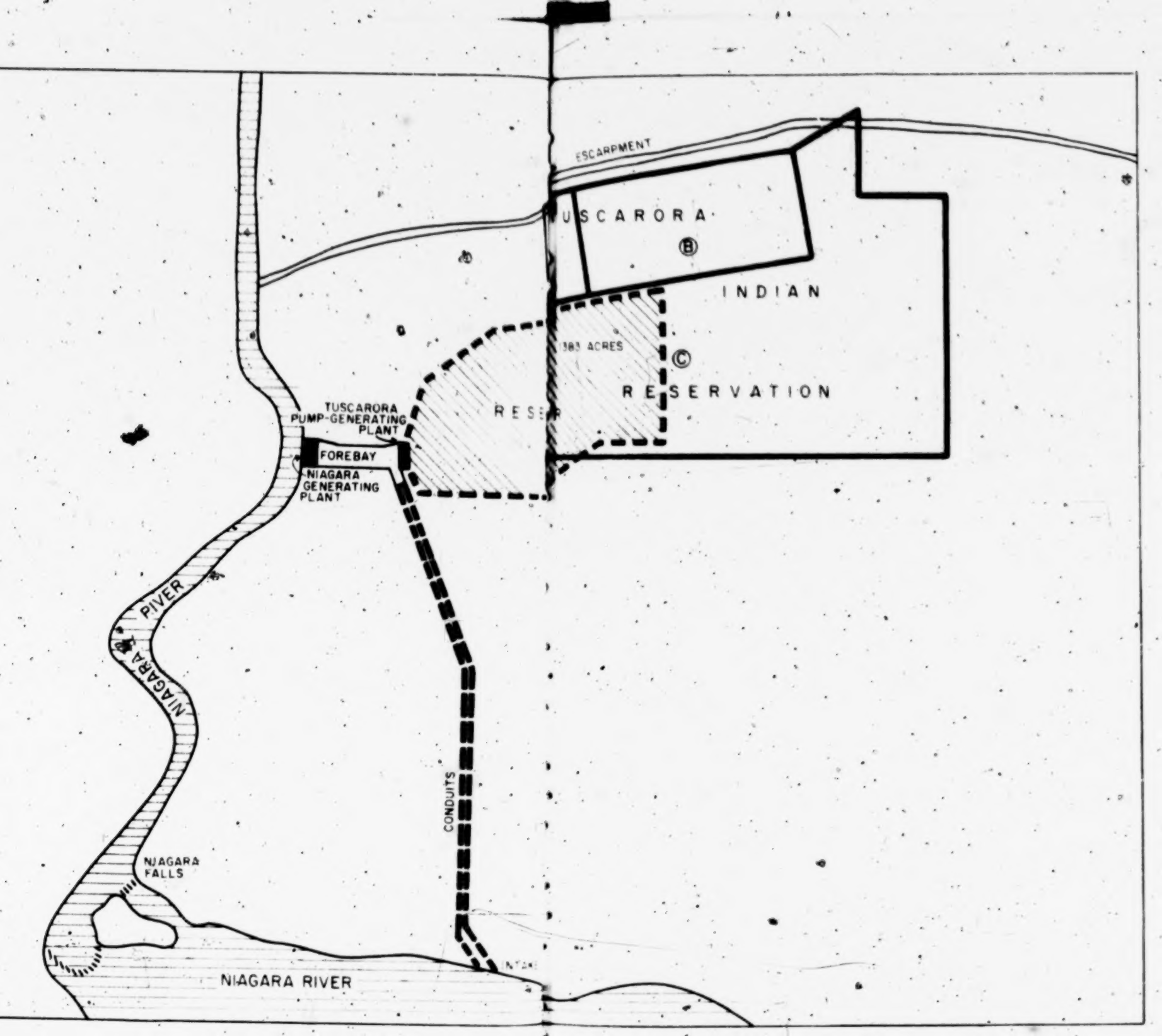
The Act of August 21, 1957 (Public Law 85-159, 71 Stat. 401) authorizing the project, prescribes some conditions to be included in the license "in addition to those deemed necessary and required" under the Federal Power Act. Section 10 of the Federal Power Act prescribes additional conditions and in paragraph (g) provides for:

> "Such other conditions not inconsistent with the provisions of this Act as the Commission may require."

Neither act directs the imposition of the type of condition sought by petitioner and the Commission did not err in refusing to include it in the January 30 order. Whether or not such a condition is to be inserted is essentially an administrative function. Federal Power Act § 10(g); *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17 (1952); *Metropolitan Edison Co.* v. *Federal Power Commission*, 169 F. 2d 719 (3d Cir. 1948).

In reviewing a Federal Power Commission order issuing a license, no objection may be considered by the Court "unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for the failure to do so." (Federal Power Act § 313(b))

Therefore, in view of the content of petitioner's application for rehearing before the Commission, all that the Dis-


ESCARPMENT
TUSCARORA
INDIAN
RESERVATION
383 ACRES
TUSCARORA PUMP-GENERATING PLANT
FOREBAY
NIAGARA GENERATING PLANT
NIAGARA RIVER
CONDUITS
NIAGARA FALLS
NIAGARA RIVER

trict of Columbia Circuit can review is the Commission's refusal to exclude petitioner's land from the project at that point—a matter completely within the Commission's discretion.

In any event, in its May 5 order, not objected to by petitioner, the Commission affirmatively included petitioner's land in the project and thus made the firm determination sought by petitioner. This made moot the one objection to the January 30 order made in the application for rehearing and hence the one question conceivably subject to review by the Court.

5. There is no merit to petitioner's contention that the Commission erred in refusing to exclude petitioner's land from the project as licensed on the ground that it was a reservation of the United States and the Commission had failed to make findings required to be made in connection with licensing lands in such reservations.

In its application for rehearing on the Commission's January 30 order, petitioner contended that the Commission had erred in refusing affirmatively to exclude petitioner's lands from the Niagara Project because the Commission had failed to make the finding required by section 4(e) of the Federal Power Act in the case of reservations of the United States as defined in section 3(2) of the Act.

In its petition to the Court of Appeals for the District of Columbia Circuit for review of the May 5 order, petitioner asked the Court to remand the case to the Commission on the ground that the January 30 order was defective in its failure to contain such findings.

As we have shown the District Court and the Court of Appeals for the Second Circuit found this contention to be without merit. They were palpably right.

Section 4(e) of the Federal Power Act authorizes the Commission to issue water power licenses on (1) streams under the jurisdiction of Congress and (2) "*any part of the public lands and reservations of the United States*" (emphasis added). The statute provides that a license

> "shall be issued within any reservation only after a finding by the commission that the license will not

> interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: * * *"

In the case of the Niagara, the Commission issued a license because the river is a navigable and international stream under the jurisdiction of Congress. By its May 5 order approving "Exhibit J" it made the lands of the petitioner, which are the subject of this action, part of the project but it did so pursuant to the power delegated to it by Congress to issue licenses on streams under the jurisdiction of Congress. (Appendix, p. 13a).

Petitioner's lands do not constitute a "reservation of the United States". They were never owned by the United States and the United States has no interest in them.

Federal Power Act Sections 3(1) and 3(2) defining "public lands" and "reservations" make it abundantly clear that the type of reservation referred to in section 4(e) is a reservation *owned by the United States* and carved out of the public domain.

The Commission has always construed the statute in this way, as evidenced by Federal Power Commission Regulations, Section 4.40(g) prescribing the contents of applications for licenses and Section 4.41 prescribing the contents of "Exhibit F" and "Exhibit J" to such applications. See also *Federal Power Commission* v. *Oregon*, 349 U. S. 435, 443-45 (1955); *Sioux Tribe* v. *United States*, 94 Ct. Cl. 150, 170, *aff'd*, 316 U. S. 317 (1942).

The Department of Interior advised the Federal Power Commission that petitioner's reservation is not under its jurisdiction and the Commission regarded this fact as lending additional support to its conclusion that petitioner's lands do not constitute a reservation within the meaning of Section 4(e). (Appendix, p. 15a).

II

The Court Below Was Clearly Correct in Upholding Respondent's Power to Acquire Petitioner's Land by Eminent Domain.

Petitioner admits that the United States may exercise the power of eminent domain over Indian lands, even when protected by treaty, *Cherokee Nation* v. *Southern Kansas Railway Company*, 135 U. S. 641 (1890), but asserts that the Power Authority, an agent of the United States carrying out a public purpose of the United States under express Congressional mandate, cannot exercise the United States' power of eminent domain without specific Congressional authorization. It cites no authority whatever which supports this.*

By Public Law 85-159 (71 Stat. 401) Congress directed the Federal Power Commission to issue the Power Authority a license for a project extensive enough to make sensible use of all the Niagara water available to the United States. As the reports of both Houses indicate, (Sen. Report 539, 85th Cong. 1st Sess.; H. R. No. 862, 85th Cong. 1st Sess.) Congress was apprised of the fact that such a project would involve a storage reservoir. Material submitted showed that this would cover a large area near the Niagara River and the City of Niagara Falls. For example, the House Public Works Committee files still contain a document dated July 25, 1957, addressed to all members of the House indicating that the reservoir would have a capacity of 60,000 acre feet. Other documents submitted contained sketches

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* *United States* v. *2005.32 Acres of Land*, 160 F. Supp. 193 (D. S. Dak. 1958), shows only that Congress may provide for other means of acquiring particular Indian land. There government officials began condemnation despite a Congressional directive to negotiate with the Indians and, if negotiations were unsuccessful, to report the fact to Congress (Act of September 30, 1950, 64 Stat. 1093). The result of the case has now been reversed by the Congress (Act of September 2, 1958, Public Law 85-915).

showing the size and location of the reservoir. Congress refused to legislate on the details of the design and features of the project and delegated to the Commission the job of approving such features pursuant to the Federal Power Act. Congress made the Federal Power Act available to the Power Authority as licensee. It became vested with the rights given by Section 21 to acquire by eminent domain in Federal or State courts all land necessary for the project.

Petitioner's chief contention is that the case of *Elk* v. *Wilkins*, 112 U. S. 94 (1884) keeps Section 21 from applying to Indians because Congress did not specifically say that it should. Petitioner has apparently abandoned the contention made below that treaties prevent the taking of its land and therefore relies wholly on the proposition contained in the dictum in *Elk* v. *Wilkins* to the effect that general statutes do not apply to Indians unless so expressed as clearly to manifest an intention to include them. This dictum is long since outmoded. The *Elk* case held that Indians were not included in "all persons born or naturalized in the United States" as provided in the Fourteenth Amendment and that therefore they had no right to vote. The following cases have since held that general acts of Congress do apply to Indians or Indian lands:

Oklahoma Tax Commission v. *United States*, 319 U. S. 598 (1943);

Five Civilized Tribes v. *Commissioner*, 295 U. S. 418 (1935);

Shaw v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575 (1928);

People ex rel. Kennedy v. *Becker*, 241 U. S. 556 (1916);

Barker v. *Harvey*, 181 U. S. 481 (1901);

Albany v. *United States*, 152 F. 2d 266 (6th Cir. 1945);

Bailey, et al. v. *United States*, 47 F. 2d 702 (9th Cir. 1931);

Y-Ta-Tah-Wah v. *Rebock, et al.*, 105 Fed. 257 (N. D. Iowa 1900);

United States v. *Claus*, 63 F. Supp. 433 (W. D. N. Y. 1944);

Totus v. *United States*, 39 F. Supp. 7 (E. D. Wash. 1941);

Acosta v. *San Diego County, et al.*, 126 Cal. App. 2d 455, 272 P. 2d 92 (1954);

Anderson v. *Britton*, 212 Ore. 1, 318 P. 2d 291 (1957), *cert. denied*, 356 U. S. 962 (1958);

Keokuk v. *Ulam*, 4 Okla. 5, 38 Pac. 1080 (1894).

Section 21 of the Federal Power Act is of the broadest type of statutory provision. It is therefore directly analogous to the Internal Revenue Code which was held in *Five Civilized Tribes*, *supra*, to include the land and income of even a restricted Osage Indian within its scope. And the power of eminent domain is on an equal footing with the power to tax. Both are inherent attributes of sovereignty. *Miss. and Rum River Boom Co.* v. *Patterson*, 98 U. S. 403 (1879); *Kohl* v. *United States*, 91 U. S. 367 (1876). As this Court held in *Five Civilized Tribes*, where, as here, the language of a general act and the public policy underlying it are broad enough to include them, Indians must be specifically and unequivocally *excluded* to be exempt from its terms and conditions.*

Thus, in *Barker* v. *Harvey*, *supra*, the Court was called upon to consider whether Congress had intended to include Indians within the scope of an act invalidating Mexican grants to lands in California not claimed within two years of the act. This Court held that the failure of Congress to exclude these Indians, commonly known to be residents of the geographic area affected by the act, from

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* *Five Civilized Tribes* virtually overruled *Blackbird* v. *Commissioner*, 38 F. 2d 976 (10th Cir. 1930), cited and relied on by petitioner as *Chouteau* v. *Commissioner*. In *Five Civilized Tribes* the Tenth Circuit Court declined to follow the *Blackbird* precedent and its refusal was expressly approved by this Court (295 U. S. 418, 419). *Elk* v. *Wilkens* was cited to the Court in *Five Civilized Tribes*, and was the basis of the *Blackbird* holding which the Court rejected.

the scope of the act evinced an intent to have them *included* within the scope thereof. In holding an Indian within the scope of, and barred under, the terms of the act, this Court stated:

> "[A]s no action has been shown in relation to these particular Indians, or their claims to these lands, *it is fairly to be deduced that Congress considered that they had no claims which called for special action.*" (pp. 492-93) (emphasis added)

The true rule is that Indians, like all others, must be deemed included within the scope of a general statute unless explicitly excepted. Therefore, Tuscarora land must be deemed included within the scope of Section 21 of the Power Act. If we were to assume *arguendo* Congressional consent to be necessary to the taking of petitioner's land the cases cited above show that this section constitutes all the Congressional "consent" necessary to the taking.

In any event, it is perfectly clear that when Congress enacted the Federal Water Power Act it anticipated that Indian lands would be necessary for licensed projects. It inserted provisions to protect Indians living on lands of the United States, but rejected a Senate amendment which would have required Indian consent to projects on lands ceded by the United States under an Indian treaty (59 Cong. Rec. 1534, 1564-1570). Senator Myers opposed the amendment because it would permit Indians to block a project. He said:

> "A man who owns a farm in fee simple has an absolute title to it, but it may be taken away from him by the courts by the process of condemnation for public use. Indians who hold land by treaty do not hold it by any more sacred right or any more absolute title than does an American citizen who owns his land in fee simple." (59 Cong. Rec. 1565).

Myers' view prevailed in conference:

> "The conferees saw no reason why water power use should be singled out from all other uses of

Indian reservation land for special action of the council of the tribe." (H. R. No. 910, 66th Cong.)

Petitioner suggests that the general wardship which the Government exercises over Indians for the purpose of keeping them from being exploited by the white man, particularly Section 177 of Title 25, which forbids white men to purchase Indian land except under the auspices of the Federal government, bars the taking of petitioner's land by an agent of the sovereign through the exercise of eminent domain.* Wardship statutes were not enacted to protect Indians from the government itself, but rather to protect them from strangers. In this case petitioner's land is being taken for a government purpose by a duly delegated agent of the government pursuant to Federal statutes permitting it.

Prior to this action Section 177 had never been held to apply to the exercise of eminent domain over Indian land in New York either by the Federal government or the New York state government. Indeed, it has never been held even to apply to the purchase of land by New York in its proprietary as distinguished from its sovereign capacity.

Section 177 has been in effect in virtually the same form since it was first enacted as Section 8 of the Act of March 1, 1793 (1 Stat. 330). During the entire period New York has condemned Indian land within its borders for all sorts of public purposes. *Wadsworth* v. *Buffalo Hydraulic Assoc.*, 15 Barb. 83 (N. Y. Sup. Ct., Niagara Co., 1853); *Jemison* v. *Bell Telephone Co.*, 186 N. Y. 493 (1906); *United States* v. *Cattaraugus County*, 74 F. Supp. 413 (W. D. N. Y. 1947); *O'Meara* v. *Comm'rs*, 3 Thomp. & Cook 235, *rev'd on other grounds*, 59 N. Y. 316 (1874); *France* v. *Erie R. Co.*, 5 Thomp. & Cook 12 (1874); *Button* v. *Snyder*, 7 F. Supp. 597 (W. D. N. Y. 1934); *Dixon* v. *State*, 4 Misc. 2d 76 (1956);

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*25 U. S. C. § 233 (Appendix p. 11a), also relied upon by petitioner to indicate that Section 177 is still effective, has not the remotest bearing on eminent domain.

Jones Cut Stone Co. v. *State*, 7 Misc. 2d 1048 (1957): Reports of New York Attorney General (1904) 394, (1931) 324 and 358, (1941) 266, (1944) 376; New York Indian Law, Sections 12 and 90, New York Highway Law, Section 53.*

As stated by the court below, the Power Authority as a licensee of the Federal Power Commission is taking petitioner's land as an agent of the sovereign United States. If for 180 years New York could take such land for state purposes, *a fortiori*, an agent of the Federal Government can do so for Federal purposes.**

---

* As pointed out at p. 7, *supra*, petitioner's lands which are the subject of this action were never owned by the Federal Government and are not protected by any treaty.

Congress has provided procedures for the condemnation of Indian land in the West where the Federal Government owns the underlying fee or holds the land in trust for the Indians, e. g., 25 U. S. C. §§ 311, 328; 43 U. S. C. §§ 599, 961. It has established no procedure for condemning Indian land in New York except that contained in Section 21 of the Federal Power Act. Cases which require that the Federal Government be a party to condemnations involving Indian land because the Government is the owner of it do not apply. *cf. Minnesota* v. *United States*, 305 U. S. 382 (1939); *United States* v. *Colvard*, 89 F. 2d 312 (4th Cir. 1937).

** The Power Authority acquired the land needed by the Seaway Development Corporation (established under Public Law 358, 83rd Cong., 68 Stat. 92, 33 U. S. C. §§ 981 *et seq.*) for navigation purposes in the area of the St. Lawrence River where the joint power-seaway project was constructed (*infra*, p. 31). The St. Regis Indian Reservation is downstream from that area and there the Seaway Corporation took Indian land by condemnation in the District Court. (*St. Lawrence Seaway Development Corporation* v. *88.57 Acres of Land, et al.*, N. D. N. Y., Civ. No. 6442—1957; *St. Lawrence Seaway Development Corporation* v. *8.51 Acres of Land, et al.*, N. D. N. Y., Civ. No. 6846—1957). It had no authorization except the general power of eminent domain.

III

The Part of the Judgment Below from Which Respondent Johnson as Superintendent of Public Works of the State of New York Has Appealed Will Be Rendered Moot in Practical Effect if the Petition for Certiorari Is Denied.

Johnson's appeal from the part of the judgment below setting aside proceedings taken to appropriate petitioner's land is based upon a proper concern by the New York Attorney General that some of the language in the opinion upon which the judgment was based, suggesting that Section 177 of Title 25 applies to transactions of the State of New York, will put in jeopardy titles to a great deal of land purchased by the State from Indians as well as the sites of many public improvements which the State acquired by eminent domain.

Section 4 of the Indian Non-Intercourse Act of July 22, 1790 (1 Stat. 138)—the first such Act passed after the adoption of the Constitution—specifically provided that states could not purchase Indian lands except at treaties held under the authority of the United States. The Act of March 1, 1793 (1 Stat. 330) superseded the 1790 Act and Section 8 was in virtually the same form as the present Section 177 of Title 25. (These statutes are contained in Appendix to this brief, pp. 10a-11a). The 1793 statute eliminated the prohibition against states purchasing land from Indians and merely provided that states could purchase land at treaties held by the United States on occasions when they had agents present. This was never considered to be an exclusive method for the State's purchase of Indian rights of occupancy in land of which the State owned the fee title as successor to the King of England.

Prior to 1790 New York bought Indian rights in a good part of the territory in upstate New York without Federal intervention and from 1793 to 1845 bought Indian rights in a great deal more of such land. During the latter period it carried out at least 38 treaties with the Indians at which no

Federal representative was present. Titles to much valuable property, including a good part of the City of Syracuse depends upon the validity of those treaties.

Such titles have always been sustained when challenged. The most recent case was decided by the New York State Court of Appeals on June 25 of this year (*St. Regis* v. *State*, 5 N. Y. 2d 24 (1958)).

As stated at p. 28, *supra*, the State exercised eminent domain over Indian land throughout its history and prior to this action Section 177 was never held to forbid its doing so.

We, therefore, sympathize with the Attorney General's desire to have this Court make clear that the law as it was understood for 180 years still stands.

We also sympathize with his concern lest the opinion below cast doubt on the validity of the appropriation method of eminent domain which the State commonly employs. All the land for the New York State Thruway and the bulk of the land for the Power Authority's St. Lawrence River Power Project was acquired in the name of the State by appropriation. Similarly, most of the land needed by the Seaway Development Corporation for the navigation part of the St. Lawrence Project was thus acquired and transferred to the Corporation.

However, this case is not necessarily the occasion for a review by this Court of the questions raised by the Attorney General in Johnson's appeal.

In taking steps to acquire petitioner's land in the name of the State by appropriation, Johnson acted strictly in a ministerial capacity and his sole purpose was to make the land available to the Power Authority which needed it for its Niagara Power Project and will have to pay for it.

The Authority has abandoned efforts to obtain possession of the land by appropriation, has already acquired possession of part of it for transmission lines in the condemnation proceeding it brought in the District Court for

the Western District of New York and is perfectly content to acquire the balance in that proceeding.

As we have shown, it is in the public interest that the Authority obtain possession of the land without further delay and petitioner's application for certiorari is without merit.

If the petition is denied and the Authority is, therefore, able to obtain the land in the condemnation proceeding, the practical effect of the part of the judgment below from which Johnson appeals will be moot. We suggest that if this Court denies the petition for certiorari—as we believe it should—it can find a way of disposing of Johnson's appeal on the ground of mootness.

Conclusion

We respectfully request this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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SAMUEL I. ROSENMAN,
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September 29, 1958.

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APPENDIX A

SUPREME COURT OF THE UNITED STATES

October Term, 1958

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION, Petitioner, v. POWER AUTHORITY OF STATE OF NEW YORK, *et al.*	On Application for Stay of Mandate Pending Petition for Certiorari.

[September 8, 1958.]

MR. JUSTICE HARLAN, Associate Justice.

Petitioner Tuscarora Nation of Indians asks me to stay the mandate of the Court of Appeals for the Second Circuit pending the filing and determination of Tuscarora's petition for certiorari to review the judgment of that court, filed July 24, 1958, which so far as now material (1) adjudged that respondent Power Authority of the State of New York, as licensee of the Federal Power Commission for the construction of the so-called Niagara Power Project at Niagara Falls, New York, has the right under § 21 of the Federal Power Act, 16 U. S. C. § 814, to acquire petitioner's land by condemnation proceedings, and (2) directed any federal district court in which such proceedings might be instituted to proceed with as much expedition as possible.

On August 26, 1958, the Court of Appeals, on petitions for rehearing and for clarification filed by Tuscarora and

the Power Authority respectively, adhered to its judgment, directed that its mandate issue six days thereafter, and rendered inoperative, upon the issuance of the mandate, certain stay orders which had theretofore restricted in some respects the Authority from entering upon the Tuscarora lands pending the outcome of condemnation proceedings to acquire them.

On August 27 the Power Authority commenced such condemnation proceedings in the United States District Court for the Western District of New York, and at the same time noticed for hearing before that court at 2 p. m. on Monday, September 8, a motion for summary judgment upon its complaint.

There is also pending undetermined in the Court of Appeals for the District of Columbia Circuit a proceeding instituted by Tuscarora to review the validity of the license issued by the Federal Power Commission to the Power Authority, insofar as it purports to include petitioner's lands within the Niagara Power Project. Both sides agree that the Court of Appeals' decision in this proceeding cannot be expected at the earliest before late November or December.

On August 31, in order to afford adequate opportunity for consideration of the application now before me, I temporarily stayed the issuance of the mandate of the Court of Appeals for the Second Circuit pending my decision on the application, and at the same time set the matter for oral argument on September 6.

Tuscarora concedes, as I think it must, that the validity of the Power Authority's federal license is a matter lying exclusively within the jurisdiction of the Courts of Appeals for the District of Columbia Circuit. 16 U. S. C. § 825*l*(b); cf. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320, 334-337. That being so it is difficult for me to believe it likely that this Court would grant certiorari to review the judgment of the Court of Appeals for the Second Circuit, since the Power Authority's right to acquire Tuscarora's

lands by condemnation would ultimately seem to depend upon its federal license which is presently in force and whose validity is subject to review only by the Court of Appeals for the District of Columbia Circuit. See §§ 3(2), 4(e), and 21 of the Federal Power Act, 16 U. S. C. §§ 796(2), 797(e), 814. Nevertheless in the time at my disposal I have not been able to satisfy myself completely that in this unusual situation four members of the Court would not be persuaded to grant certiorari, or that the Court, were certiorari to be denied, would not consider that Tuscarora was nevertheless entitled to some form of interim relief for the protection of the lands in question pending the outcome of the proceedings touching the validity of the Power Authority's federal license. I am particularly constrained not to reach such conclusions at this stage of the matter because of a number of factors which seem to me to point to a solution of this application that is fair to both sides.

The Power Authority represents that if it obtains from the District Court for the Western District of New York a decree of condemnation putting it into immediate possession of the Tuscarora lands, it will proceed forthwith to erect power lines around the site of the proposed reservoir which is part of the Niagara Power Project, and further that the Authority will be exposed to substantial financial losses if this work cannot be instituted by September 15. On the other hand the Authority states that it can defer, without serious inconvenience or financial loss, other aspects of the Project involving use of Tuscarora land at least until the middle of October.

I am advised by the Clerk of the Court that if Tuscarora's petition for certiorari and the Power Authority's response thereto are both on file by September 30 the matter may be considered by the Court at its first Conference of the new Term beginning October 6. In normal course this should enable the Court's action on the petition for certiorari to be announced on October 13.

Counsel for the Power Authority states that he will be prepared to file the Authority's response within 10 days after the filing of the petition for certiorari.

In light of the foregoing I shall make the following disposition of Tuscarora's present application: The mandate of the Court of Appeals for the Second Circuit shall be allowed to issue, but the execution and enforcement of the judgment entered pursuant thereto shall be stayed pending the filing and determination of Tuscarora's petition for certiorari, except to the extent that it bears upon the Power Authority's right to acquire in the pending condemnation proceedings Tuscarora's lands and the possession thereof for the purpose of constructing power lines around the proposed reservoir included in the Niagara Power Project, subject however to the following terms and conditions:

1. Tuscarora's petition for certiorari shall be filed on or before September 19, 1958;

2. The Court shall have announced its action on the petition for certiorari by October 13, 1958;

3. If the Power Authority's response to the petition for certiorari shall not have been filed on or before September 30, 1958, or if the Court for any other reason shall not have announced its action on such petition by October 13, 1958, then in either event Tuscarora shall have leave to apply for a further stay; and

4. If the petition for certiorari is denied, this stay shall expire on the third day following the Court's order to that effect.

5. In the event that petition for certiorari is granted, the stay is to continue pending the issuance of the judgment of this Court.

This disposition will enable Tuscarora to put its case to the full Court, without unduly tying the hands of the Power Authority in the interval.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1958

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

Petitioner,

vs.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner for a stay of the issuance of the mandate of the United States Court of Appeals for the Second Circuit and of the opposition of respondents thereto, and after hearing the oral arguments of counsel,

IT IS ORDERED that the temporary stay of the mandate heretofore issued on August 31, 1958 be, and the same is hereby, vacated.

IT IS FURTHER ORDERED that, pursuant to the memorandum filed this day, the motion for a stay of the issuance of the mandate of the United States Court of Appeals for the Second Circuit is denied, but that the execution and enforcement of the judgment of the United States District Court for the Western District of New York entered pursuant thereto be, and the same is hereby, stayed pending the filing of a petition for a writ of certiorari by the petitioner, except to the extent that it bears upon the Power Authority's right to acquire in the pending condemnation proceedings Tuscarora's lands and the possession thereof

for the purpose of constructing power lines around the proposed reservoir included in the Niagara Power Project, subject, however, to the following terms and conditions:

1. Tuscarora's petition for certiorari shall be filed on or before September 19, 1958;

2. The Court shall have announced its action on the petition for certiorari by October 13, 1958;

3. If the Power Authority's response to the petition for certiorari shall not have been filed on or before September 30, 1958, or if the Court for any other reason shall not have announced its action on such petition by October 13, 1958, then in either event Tuscarora shall have leave to apply for a further stay; and

4. If the petition for certiorari is denied, this stay shall expire on the third day following the Court's order to that effect.

5. In the event that the petition for certiorari is granted, the stay is to continue pending the issuance of the judgment of this Court.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme
Court of the United States.

September 8, 1958.

APPENDIX B

Article I, Section 8 of the United States Constitution provides:

"Section 8. The Congress shall have Power . . .

". . .

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . "

Public Law 85-159, Act of August 21, 1957, 16 U. S. C. §§ 836, 836a, provides in pertinent part:

"§ 836. Authorization to license construction and operation; licensing conditions

The Federal Power Commission is expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:

(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized

and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

* * *

(3) The licensee shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Power Commission project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: * * *."

Sections 3(1) and 3(2) of the Federal Power Act, 16 U. S. C. § 796(1), (2), provide:

"§ 796. Words used in chapter defined

"The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

"(1) 'public lands' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations', as hereinafter defined;

"(2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;".

Section 4(e) of the Federal Power Act, 16 U. S. C. § 797 provides in part:

"§ 797. General powers of commission

"The commission is hereby authorized and empowered—

. . . .

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: . . ."

Section 21 of the Federal Power Act, 16 U. S. C. § 814 provides in pertinent part:

"§ 814. Exercise by licensee of power of eminent domain

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary

to the construction, maintenance or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. . . ."

Section 4 of the Indian Non-Intercourse Act of July 22, 1790 (1 Stat. 138) provided:

> "No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

Section 8 of the Indian Non-Intercourse Act of March 1, 1793 (1 Stat. 330) provided:

> "Sec. 8. *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treaty with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to pro-

pose to, and adjust with the Indians, the compensation to be made for their claims to lands within such State, which shall be extinguished by the treaty."

Section 177 of Title 25 of the United States Code (R. S. 2116) provides as follows:

"§ 177. *Purchases or grants of lands from Indians.* No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

Section 233 of Title 25 of the United States Code (64 Stat. 845) provides as follows:

"§ 233. Jurisdiction of New York State courts in civil actions

"The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided*, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of

the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further*, that nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcemer of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

The Order of the Federal Power Commission issued January 30, 1958, licensing Project No. 2216 provides in pertinent part:

"The Tuscarora Indian Nation objects to the use of approximately 1,000 acres of its land for reservoir purposes. The stated reason for its objection is that it wants to remain undisturbed in possession of the land. The lands of the Indian Nation are almost entirely undeveloped except for agricultural use. The

Indian Nation states that it will not sell its lands and contends that the Applicant lacks authority to acquire them. However, we do not attempt to pass on that question since other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive.

* * *

"*The Commission finds:*

"(1) The proposed project would affect navigable waters of the United States.

"(2) The project authorized herein consists of:

"(a) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by the Licensee or by the United States; such project area and project boundary being more specifically shown and described by certain exhibits filed by Applicant, the approval of which by the Commission shall be as hereinafter provided.

"(b) All project works comprising: . . .

* * * *

"(4) The Tuscarora pumped-storage reservoir in the Town of Lewiston located adjacent to the pumping-generating plant having a maximum normal operating level at elevation 645 feet, a usable storage capacity of about 60,000 acre feet with a drawdown of about 25 feet, and with the top of the encompassing dike at elevation 655 feet;

* * *

"*The Commission orders:*

"(A) This license is issued to Power Authority of the State of New York (hereinafter referred to as the Licensee) under the provisions of Section 4(e) of the Federal Power Act and Public Law 85-159 (71 Stat. 401), . . .

* * *

. . . and subject to the following special conditions set forth herein as additional articles:

• • •

Article 33. The Licensee shall, not later than July 1, 1958, file for Commission approval revised Exhibits J and L drawings for the pumped-storage reservoir, for the cut and cover conduit system extending from the Conners Island intake structure to the Tuscarora forebay/afterbay; and for the open canal extending from the Tuscarora forebay/afterbay to the Lewiston forebay."

The Order of the Federal Power Commission issued March 21, 1958, denying petitioner's application for rehearing on the January 30th order, provides:

"On February 28, 1958, the Tuscarora Indian Nation (Intervener) filed application for rehearing of the Commission's order issued January 30, 1958, issuing license to the Power Authority of the State of New York (Licensee) to construct, operate and maintain a proposed hydroelectric redevelopment project to be located along the Niagara River in the State of New York. In its application for rehearing, intervener has requested modification of said order to exclude approximately 1,000 acres of land of the Tuscarora Indian Nation which the licensee proposes to acquire for reservoir purposes.

"By Public Law 85-159 (71 Stat. 401) we were directed to issue a license to the Power Authority of the State of New York for the Niagara redevelopment. The pumped-storage reservoir, which is part of the Niagara redevelopment, would have a storage capacity of 50,000 acre feet and would occupy about 2,800 acres of land. The best location of the reservoir would require approximately 1,000 acres of land owned by Intervener.

"In its application for rehearing Intervener contends that the Licensee lacks power to acquire Intervener's lands and that the Commission does not have power to authorize the Licensee to use them. However, Intervener also points out that the law on this question is unsettled in the light of Section 21 of the Federal Power Act.

"It is not unusual for a land owner to refuse to part with land which is necessary for some public purpose, a matter which Congress was aware of when it enacted Section 21 of the Act. The question of whether the Licensee is empowered to acquire Intervener's land in eminent domain proceedings is, in our view, a question to be resolved by a court of competent jurisdiction. In any event, we are of the view that we are not required to render an advisory opinion on that question.

"Lastly, Intervener contends that the Commission did not make a finding required by Section 4 (e) of the Act relating to 'reservations' as defined in the Act. The status of Intervener's lands were discussed in a letter from an Assistant Secretary of the Interior to Intervener under date of November 1, 1957. The letter states that: 'As your reservation lands are under State jurisdiction, this Department is not in a position to present your case for you.' Since Intervener's lands are not within an Indian reservation under supervision of the Secretary of the Interior they are not part of a 'reservation' referred to in Section 4 (e) as defined in Section 3 (2) of the Act and the finding suggested by Intervener is not required.

"On March 18, 1958, Intervener filed a motion requesting us to stay our license order of January 30, 1958 'pending a decision on the Petition for Rehearing.' The motion was not filed in time to permit us to consider it prior to our consideration of the application for rehearing. In view of our denial herein of that application the motion for stay has become moot. Consequently, it should be dismissed.

"*The Commission finds:*

"The assignments of error and grounds for rehearing in the above-described application for rehearing set forth no new facts or principles of law which were not fully considered by the Commission when it adopted its above-described order issued January 30, 1958, or which having now been considered warrant any change or modification of said order.

"The Commission orders:

"(A) The application for rehearing and modification of the Commission's order issued January 30, 1958, is hereby denied.

"(B) The motion for stay of the Commission's order issued January 30, 1958, is hereby dismissed."

The order of the Federal Power Commission issued May 5, 1958, approving "Exhibit J" to Power Authority's license, provides:

"On May 1, 1958, in compliance with Article 33 of its license for major Project No. 2216, Power Authority of the State of New York filed for Commission approval and inclusion in the license the following described project exhibit:

Exhibit J (FPC No. 2216-32) entitled 'General Map—Niagara Power Project'.

"The Exhibit J drawing is a general map of the entire project area, showing the location of the project works authorized by the license for Project No. 2216.

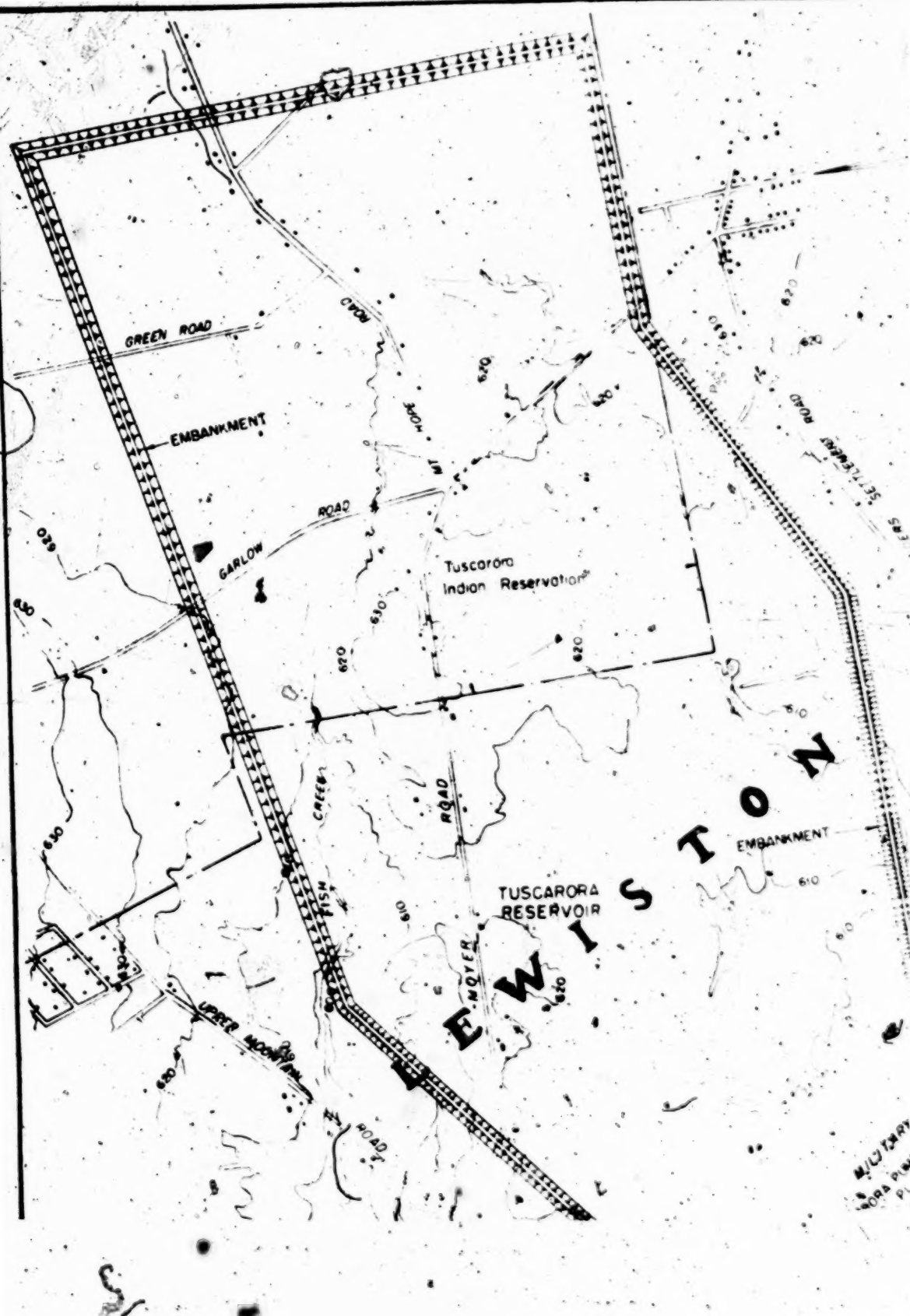
"The Commission finds:

"The above-described Exhibit J drawing conforms to the Commission's rules and regulations and should be approved as part of the license for the project.

"The Commission orders:

"(A) The above-described Exhibit J drawing is approved as part of the license for Project No. 2216.

"(B) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313 (a) of the Federal Power Act, and failure to file such an application shall constitute acceptance of this order."


GREEN ROAD
EMBANKMENT
GARLOW ROAD
MT HOPE ROAD
Tuscarora
Indian Reservation
FISH CREEK
ROAD
MOYER
TUSCARORA
RESERVOIR
EMBANKMENT
LEWISTON
UPPER MOUNTAIN ROAD
SETTLEMENT ROAD
620
630
610

PROPOSED SHORELINE
NORTH GRAND ISLAND BRIDGE
Buckhorn Island
BUFFALO AVE
DIKE
STATES OF CANADA
UNITED DOMINION
RIVER INTAKE STRUCTURE
PART PLAN
NIAGARA
JUNCTIO
CITY LINE
HOUSE REDEVELOPMENT AREA
PACKARD
ROAD
NIAGARA FALLS
NIAGARA
STON
EMBANKMENT
SETTLEMENT ROAD
SAUNDERS
CITY LINE
ROAD
COVERED CONDUIT
PUMP STATION
39TH ST
ROBBINS
PORTER
NEW YORK CENTRAL R.R.
STOP LOG AND TRANSITION STRUCTURE
WITMER RD BRIDGE
MILITARY
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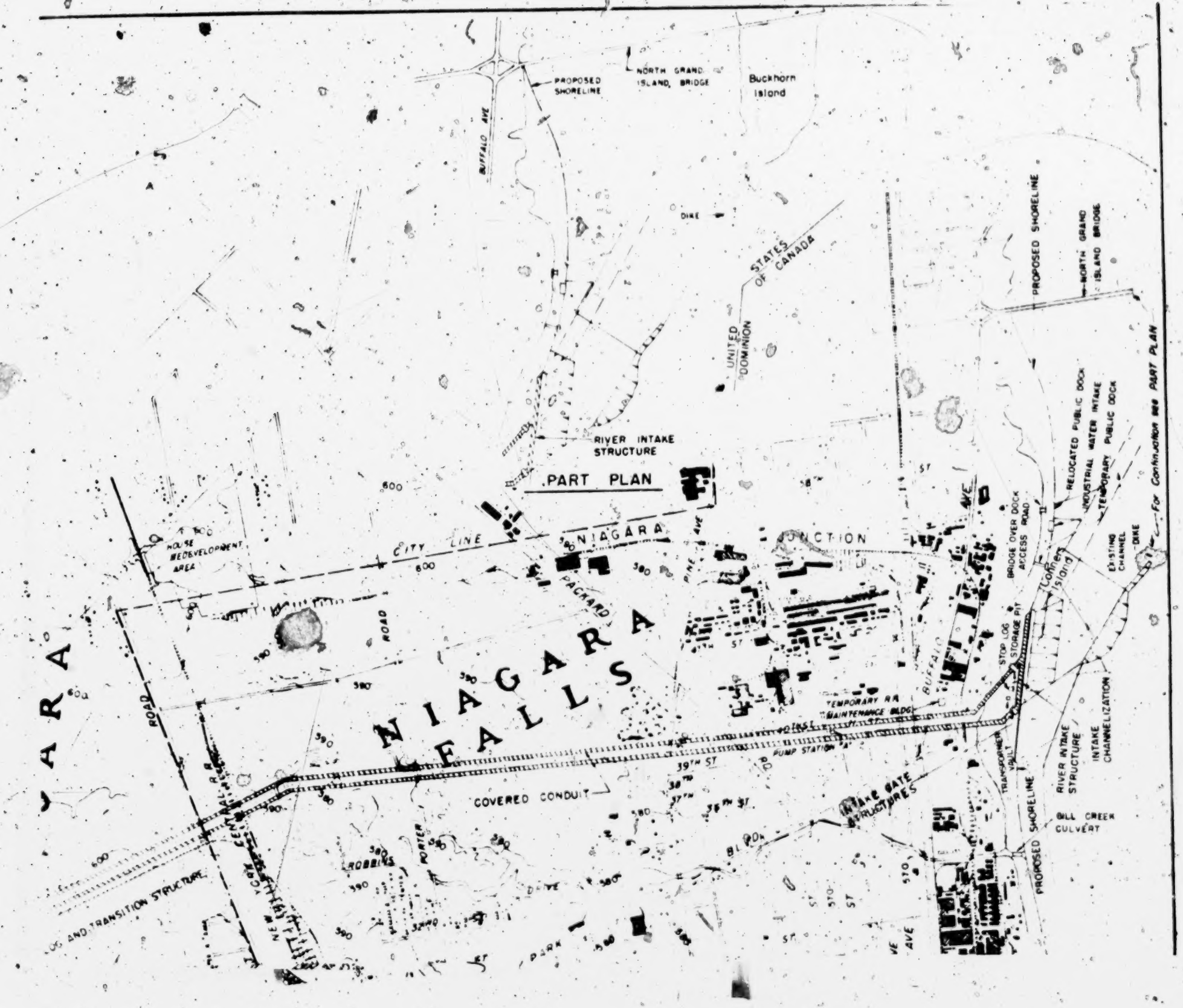
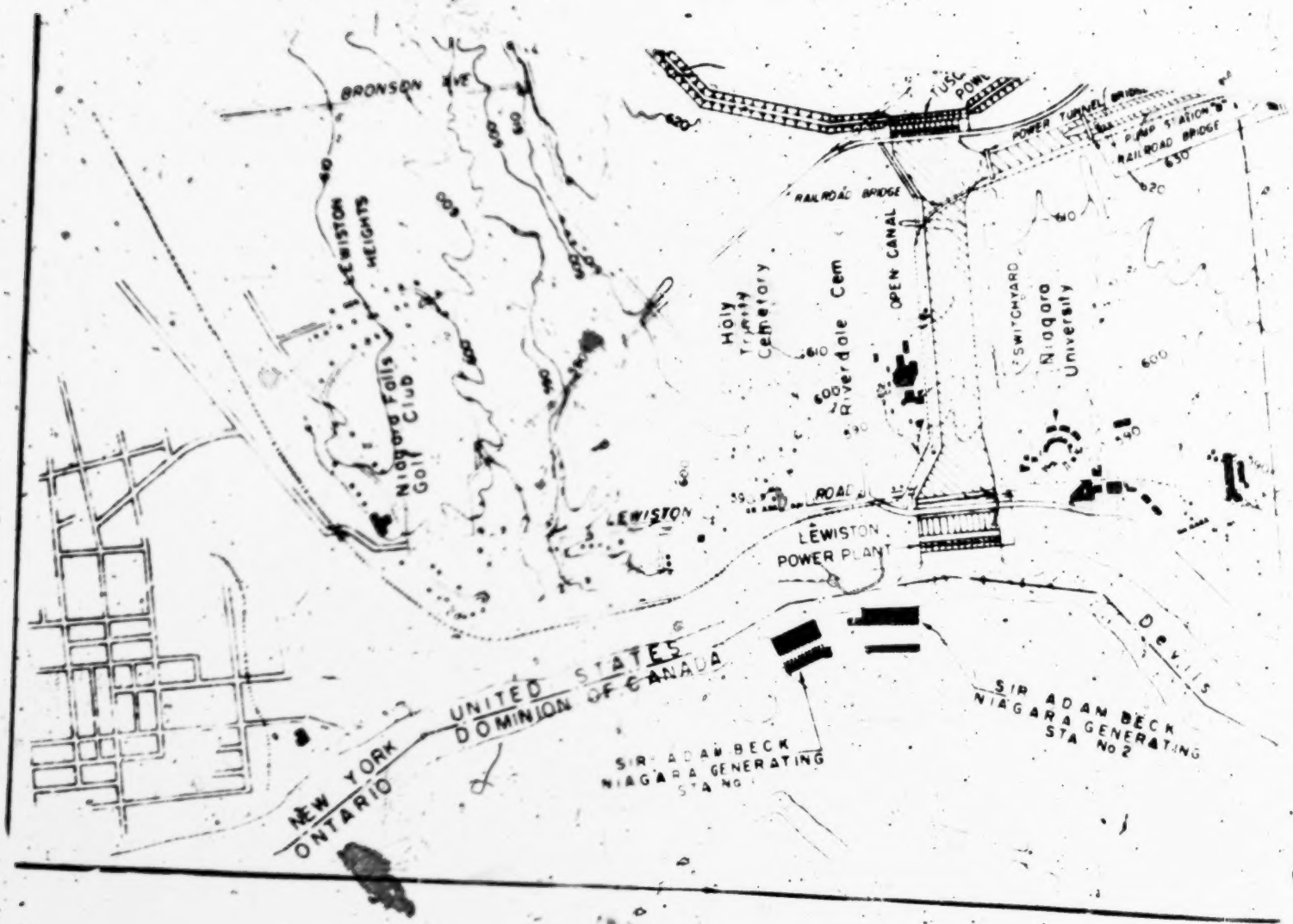

PROPOSED SHORELINE
NORTH GRAND ISLAND BRIDGE
Buckhorn Island
BUFFALO AVE
DIKE
STATES OF CANADA
UNITED DOMINION
PROPOSED SHORELINE
NORTH GRAND ISLAND BRIDGE
RIVER INTAKE STRUCTURE
PART PLAN
RELOCATED PUBLIC DOCK
INDUSTRIAL WATER INTAKE
TEMPORARY PUBLIC DOCK
For Continuation see PART PLAN
HOUSE MEDEVELOPMENT AREA
CITY LINE
NIAGARA JUNCTION
PACKARD
PINE AVE
BRIDGE OVER DOCK ACCESS ROAD
Conners Island
EXISTING CHANNEL
DIKE
NIAGARA FALLS
ROAD
STOP LOG STORAGE PIT
TEMPORARY R.R. MAINTENANCE BLDG
PUMP STATION "A"
39TH ST
COVERED CONDUIT
INTAKE GATE STRUCTURES
TRANSFORMER VAULT
RIVER INTAKE STRUCTURE
INTAKE CHANNELIZATION
PROPOSED SHORELINE
GILL CREEK CULVERT
ROBBINS
PORTER
DRIVE
PARK
NEW YORK CENTRAL R.R.
LOG AND TRANSITION STRUCTURE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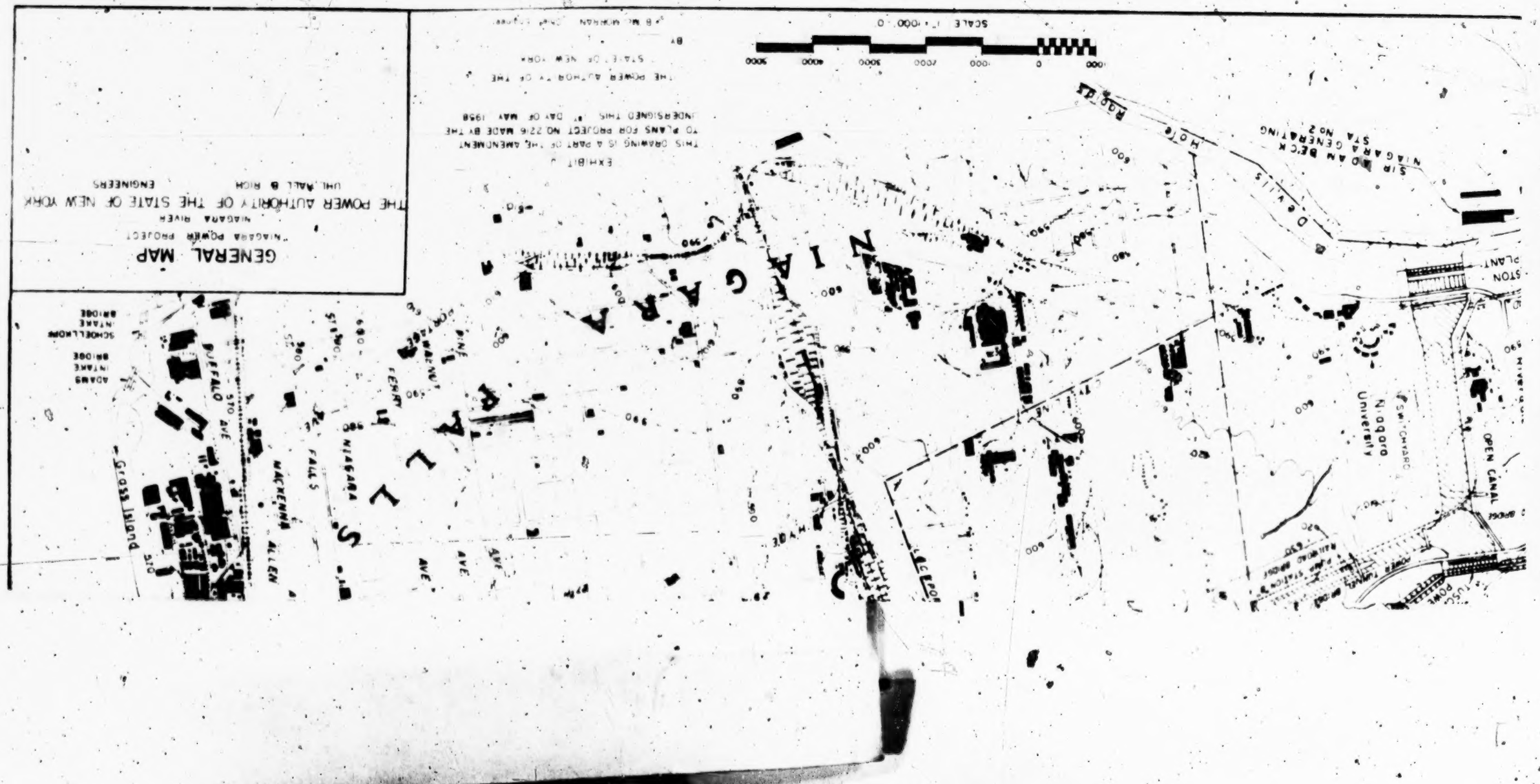
LEWISTON HEIGHTS
Niagara Falls Golf Club
Holy Trinity Cemetery
Riverdale Cem
OPEN CANAL
TUSC POWL
POWER TUNNEL
PUMP STATION
RAILROAD BRIDGE
RAILROAD BRIDGE
SWITCHYARD
Niagara University
ROAD
LEWISTON
LEWISTON POWER PLANT
NEW YORK
ONTARIO
UNITED STATES
DOMINION OF CANADA
SIR ADAM BECK NIAGARA GENERATING STA NO
SIR ADAM BECK NIAGARA GENERATING STA NO 2
DEVILS

APPENDIX C

Exhibit J to Power Authority's Federal Power Commission License, approved by the



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FILED
OCT 2 1958
JAMES R. BROWNING, Clerk
James R. Browning

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 384

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION, *Petitioner*,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES, and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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OCTOBER 2, 1958.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF OF PETITIONER

Petitioner files this reply to the brief of the respondent Power Authority of the State of New York in opposition to the petition for a writ of certiorari in order to correct certain misconceptions contained therein as to the nature and basis of petitioner's request to this Court.

Petitioner has suggested (Pet. 11-15) that this Court grant certiorari, vacate the judgment below and remand

the case to the District Court to hold all proceedings in abeyance pending the final resolution of the license review proceedings now pending in the Court of Appeals for the District of Columbia Circuit. The procedural dilemma which makes that suggestion appropriate is due entirely to factors beyond the control of petitioner. It is a dilemma manufactured by the court below as a result of certain assumptions and conclusions which it made, assumptions and conclusions which were neither appropriate nor necessary in the disposition of the appeal.

This proceeding had its origin in an effort by the petitioner to secure a declaratory judgment and injunction in relation to the respondent Power Authority's hasty effort to implement its license by invoking the appropriation procedures of state law. Within a short time after the issuance of the Federal Power Commission license on January 30, 1958, and before any judicial review of that license could be secured, the Power Authority purported to appropriate and take possession of petitioner's lands under the Public Authorities Law and the Highway Law of the State of New York. Petitioner had no alternative but to seek judicial relief from such an effort. It therefore invoked the jurisdiction of the District Court to render a declaratory judgment and injunctive relief to the effect that petitioner's lands could not under the circumstances be appropriated under New York law. It was a jurisdiction entirely distinct from that subsequently invoked in the District of Columbia court to review the license order. In other words, the jurisdiction of the courts below of necessity excluded any determination of the validity of the license, a matter as to which the Federal Power Commission would be a necessary party.

The success and propriety of petitioner's efforts are demonstrated by the holding of the Court of Appeals below—which is uncontested by the respondent Power Authority—that the aforementioned state appropriation proceedings were unauthorized and hence "are vacated and annulled." Pet. 19a. Had the Court of Appeals stopped there, the appeal would have been resolved and matters would then have awaited the termination of the license review proceedings which the court below acknowledged were pending in the District of Columbia court.

Instead, the court below took unto itself the unnecessary and unwarranted task of determining the right of the Power Authority *as a holder of a valid license from the Federal Power Commission* to condemn petitioner's lands. The court thus assumed the very issue in contention before the District of Columbia court, an issue which was within the exclusive jurisdiction of the latter court to resolve. And the court below then compounded its statutory indiscretion by ordering the District Court, should respondent decide to follow the gratuitous suggestion of invoking condemnation proceedings, to "expedite all proceedings as much as possible." Pet. 19a.

Petitioner maintains that the decision below, to the extent that it assumes or guesses that the license is valid and that immediate condemnation proceedings are authorized, disrupts the orderly judicial administration of the Federal Power Act. In short, the decision invades the exclusive jurisdiction to resolve the validity of the license which Congress has given to the District of Columbia court. Considerations of orderly judicial administration dictate that the excesses of the decision below be curbed and that the determination

of the right of the Power Authority *as a licensee under the Federal Power Act* to condemn petitioner's lands await the resolution of the validity of the license.

When the decision below is thus viewed in its proper perspective, the irrelevancies of the respondent Power Authority's opposition to the petition for certiorari become plain. It is thus no answer to say (Brief, 15-19) that the judgment below was rendered by a court of competent jurisdiction and that the judgment was *res judicata* as to all issues which were or could have been litigated. Petitioner has raised no objection to the competency of the jurisdiction of the courts below. Its objection is directed solely to the action of the Court of Appeals in abusing that jurisdiction by attempting to resolve an issue that necessarily must await the outcome of a pending proceeding in another court.

To ascribe *res judicata* concepts to the portion of the judgment below that was unnecessary and unwarranted is to intensify the confusion that already exists. The doctrine of *res judicata* was never meant to apply to an issue that should not have been decided by a court.[1] Indeed, reliance on this doctrine by the respondent Power Authority is explainable only in terms of a desire to exploit the unexpected benefits of the unwarranted decision below. The respondent Power Authority thus is urging before the Court of Appeals for the District of Columbia that the decision below is *res judicata* as to the validity of the Federal

[1] As this Court has said, "a judgment is not conclusive of any question which, from the nature of the case or the form of action, could not have been adjudicated in the case in which it was rendered." *Ash Sheep Co. v. United States*, 252 U.S. 159, 170 (1920).

Power Commission license.[2] The fact that such a contention is made only serves to emphasize the error of the court below in overreaching itself in disposing of the appeal before it.

It need hardly be added that respondent's efforts (Brief, 19-23) to demonstrate that petitioner was in no way aggrieved by the issuance of the license on January 30, 1958,[3] and that the Commission's order of that date was entirely proper are without relevance in this case. Such matters are directly involved in the pending appeal before the District of Columbia court and neither add to nor detract from the propriety of granting certiorari in this case.

Finally, the respondent Power Authority has misconstrued both the holding below and the issue which the petitioner seeks to have reviewed by this Court should a remand of the case be deemed inappropriate. The court below properly held that certain federal statutes enacted for the benefit of Indian tribes, 25 U.S.C. §§ 177 and 233, established the paramount authority of the United States over petitioner's lands and prohibit the taking of any portion of those lands without some form of Congressional consent. The only issue as to which petitioner seeks review is the further

[2] Thus at p. 14 of its brief as intervenor in the District of Columbia proceedings, respondent argues that "[u]nder these circumstances, petitioner may not before this Court litigate any question of validity of the license . . . that issue is res judicata between petitioner and the Power Authority."

[3] It is significant that the Federal Power Commission, in its brief in the license review proceedings before the Court of Appeals for the District of Columbia Circuit, makes no contention that petitioner was not aggrieved by the license order of January 30, 1958, or that petitioner lacks standing to contest that order.

holding of the court that the necessary consent of Congress can be spelled out by implication from a general statute that in no way mentions the petitioner or its lands.

Petitioner has no quarrel with the general proposition referred to by the respondent (Brief, 26-27) that in the ordinary affairs of life Indians, like all others, must be deemed included within the scope of a general statute unless explicitly excepted. See *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956). But that general rule is not here applicable since the problem is one of determining if Congress has intended to take away protections and benefits which it previously conferred in specific terms upon Indian tribes. It is in that context that petitioner maintains that a general statute of Congress should not be construed to include Indians, thus depriving them of a specific statutory protection, "unless so expressed as to clearly manifest an intention to include them." *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884).

Any holding that a general statute overrides a historic specific statutory provision designed to protect the wards of the Federal Government is deserving of the most careful scrutiny and review by this Court. As this Court has repeated many times, "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930). And see *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956). General expressions, like doubtful expressions, should be construed in favor of Indian tribes. The rejection of that principle by the court below thus creates a novel and important question which justifies the assertion of this Court's certiorari jurisdiction.

CONCLUSION

At stake in this case are important problems of effective judicial administration of issues arising out of a grant of a license by the Federal Power Commission. They are problems which merit the immediate attention of and action by this Court. And they are problems which are made imminent by the pendency of condemnation proceedings. The denial of certiorari by this Court will be a green light for the final condemnation and destruction of petitioner's lands before any decision can be rendered as to the validity of the underlying license by the only court having jurisdiction to resolve that problem.

The necessity for action by this Court is in no way diluted by the claim of the respondent (Brief, 14) that each day's delay adds to the cost of the power project and results in losses to power-users of upwards of $100,000 a day. Part of the calculated risk that any licensee must take is that adherence to statutory procedures and Congressional mandates may cost money.

For these reasons, and those advanced in the petition, the writ of certiorari should issue in this case.

Respectfully submitted,

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Washington 6, D. C.
Counsel for Petitioner

Of Counsel:

EUGENE GRESSMAN
1700 K Street, Northwest
Washington 6, D. C.

OCTOBER 2, 1958.

COPY

MOTION FILED MAY 21 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 384

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION, *Petitioner*,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES, and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING, MOTION TO SUBSTITUTE, AND PETITION FOR REHEARING

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1700 K Street, Northwest
Washington 6, D. C.
Attorney for Petitioner

Of Counsel:

EUGENE GRESSMAN
1700 K Street, N.W.
Washington 6, D. C.

May 21, 1959.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION, *Petitioner*,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES, and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON, *Respondents*.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on October 13, 1958. 358 U.S. 841. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the memorandum decision of the Court of Appeals for the District of Columbia Circuit in *Tuscarora Indian Nation* v. *Federal Power Commission*, entered on November 14, 1958, is in conflict with that of the Court of Appeals for the Second Circuit in this case as to the third question presented in the petition previously filed herein—i.e., "Whether a Congres-

sional intent to lift the specific Federal protections against the alienation of Indian tribal lands can be implied from a general statute which merely authorizes the construction of a power project and does not expressly mention either the Indians or their property."

Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds upon which the petition is based arose after such time; and the Court clearly has power, in its discretion, to entertain the petition. *Roberts Sash & Door Co.* v. *United States*, 282 U.S. 829 (1930); *Douglas* v. *Willcuts*, 295 U.S. 722 (1935); *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 474 (1947). Since this motion is presented during the same term in which the petition for a writ of certiorari was denied and since petitioner has not heretofore sought rehearing of the order of denial, the problems which divided this Court in *United States* v. *Ohio Power Co.*, 353 U.S. 98 (1957), are not here present.

Moreover, the subsequent and conflicting decision of the Court of Appeals for the District of Columbia Circuit has matured into a final order and is the basis of two petitions for writs of certiorari now pending before this Court: *Federal Power Commission* v. *Tuscarora Indian Nation*, No. 911, Oct. Term, 1958; *Power Authority of the State of New York* v. *Tuscarora Indian Nation*, No. 921, Oct. Term, 1958. The Solicitor General's petition in No. 911, p. 12, expressly relies in part upon the "direct conflict" above mentioned.

The petitioner herein submits that the petitions in Nos. 911 and 921 should both be denied, as will be

more fully explained in petitioner's opposition to those petitions. But in the event that this Court determines that the conflict is sufficiently important to warrant the grant of either or both of the aforesaid petitions, it then would be appropriate to grant the annexed petition for rehearing and issue a writ of certiorari to the Second Circuit. Such action not only would enable this Court "to do justice to the party if it appears that he has the right of the controversy", but also would give the Court "the benefit of argument and examination of the additional or contrary aspects of the question presented by the case." *Simpson & Co. v. Commissioner*, 321 U.S. 225, 229 (1944).

The foregoing considerations, combined with the fact that there still is pending before this Court an appeal by the Superintendent of Public Works of New York from certain aspects of the judgment of the Second Circuit in this case (*Johnson v. Tuscarora Nation of Indians*, No. 386, Oct. Term, 1958), warrant the grant of this motion and the consideration of the annexed petition for rehearing.

Respectfully submitted,

ARTHUR LAZARUS, JR.
1700 K Street, Northwest
Washington 6, D. C.
Attorney for Petitioner

Of Counsel:

EUGENE GRESSMAN
1700 K Street, Northwest
Washington 6, D. C.

May 21, 1959.

IN THE

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MOTION TO SUBSTITUTE PARTY RESPONDENT

Petitioner respectfully advises the Court, as more fully appears in the motion to substitute the appellant in the appeal from the judgment below now pending before this Court (*Johnson* v. *Tuscarora Nation of Indians*, No. 386, Oct. Term, 1958), that as of January 1, 1959, John Burch McMorran succeeded John W. Johnson as Superintendent of Public Works of the State of New York. Accordingly, petitioner moves

that John Burch McMorran be substituted in the place and stead of John W. Johnson, as respondent in the above-entitled cause.

Respectfully submitted,

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1700 K Street, Northwest
Washington 6, D. C.
Attorney for Petitioner

Of Counsel:

EUGENE GRESSMAN
1700 K Street, Northwest
Washington 6, D. C.

May 21, 1959.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 384

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of October 13, 1958, 358 U.S. 841, denying the petition for a writ of certiorari. Petitioner further prays that, if the Court determines that a writ of certiorari should issue as requested in *Federal Power Commission* v. *Tuscarora Indian Nation*, No. 911, Oct. Term, 1958, or in *Power Authority of the State of New York* v. *Tuscarora Indian Nation*, No.

921, Oct. Term, 1958, a writ of certiorari also issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case, limited to the third question presented in the petition filed herein on September 19, 1958.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

On November 14, 1958, subsequent to the denial of the petition in the instant case, the Court of Appeals for the District of Columbia Circuit issued a memorandum opinion which ultimately led to the entry of a final judgment on March 24, 1959. In that memorandum opinion, the Court of Appeals held, *inter alia*, that Congress, when it directed the Federal Power Commission to issue a license to the Power Authority of the State of New York to construct a power project on the Niagara River (Act of Aug. 21, 1957, 71 Stat. 401), "did not in [this] special statute consent to or authorize the taking of this Indian land for this project."

That holding, which petitioner believes to be wholly correct, contrasts with the earlier conclusion drawn by the Court of Appeals for the Second Circuit in the instant proceeding. The court here held that Congressional authorization for the taking of the Indian land in question could be found in the Act of August 21, 1957, 71 Stat. 401, by inferring "from the nature of the project and its proximity to the Reservation or from the impracticability of constructing it without taking a portion of the Tuscarora Reservation that Congress intended to authorize such a taking." 24 885, 893. That inference and conclusion led to the formulation of the third question presented by

the petition for a writ of certiorari in this case,* the question being phrased as follows (p. 3):

> "3. Whether a Congressional intent to lift the specific Federal protections against the alienation of Indian tribal lands can be implied from a general statute which merely authorizes the construction of a power project and does not expressly mention either the Indians or their property."

The Solicitor General of the United States, in petitioning this Court for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit (No. 911, Oct. Term, 1958), presents as the first question involved (pp. 2-3):

> "1. Whether Congress, in specifically authorizing the Niagara Project in 1957, granted the Power Authority of the State of New York the right to take lands of the Tuscarora Indians needed for this purpose, without regard to any otherwise applicable provisions of the Federal Power Act limiting the use of Indian lands."

And in urging that certiorari should be granted, the Solicitor General states (p. 12): "On this point, the decision below is in direct conflict with the views of the Second Circuit, expressed in a suit dealing with condemnation of the Tuscarora lands." The petition for a writ of certiorari in No. 921, Oct. Term, 1958, also phrases as the second of the questions there presented (p. 2) whether the provisions of the Federal

* The first two questions presented by the petition for a writ of certiorari in this case, relating to the problems created by the entry of the Second Circuit decision prior to the rendition of the District of Columbia Circuit judgment as to the validity of the basic license, are no longer pertinent in view of the rendition of the District of Columbia Circuit judgment. Only the third question presented still is unsettled.

Power Act relating to reservations were "superseded" by the Act of August 21, 1957, 71 Stat. 401, and asserts (p. 7) that the authority for the issuance of a license covering Tuscarora lands "is found" in this 1957 statute.

Petitioner believes, and will so urge in opposition to the petitions in Nos. 911 and 921, that any conflict over the meaning to be attached to the Act of August 21, 1957, 71 Stat. 401, is unique and unimportant, and raises nothing more than a non-recurring issue of statutory interpretation which would be inappropriate for this Court to review. In addition, petitioner believes that the construction placed upon the 1957 Act by the District of Columbia Circuit is so clearly correct** that further consideration of the matter by this Court would serve no beneficial purpose. Consequently, if petitioner's views prevail and if this Court determines not to review the judgment of the Court of Appeals for the District of Columbia Circuit, then further consideration of the judgment below becomes unnecessary and this petition for rehearing may appropriately be denied.

But if the Court deems it advisable to grant the petition in either No. 911 or 921, including or limited to the question of statutory construction as to which

** The opinion of the Court of Appeals for the Second Circuit with respect to the 1957 Act was a gratuitous declaration based upon the assumption that the New York Power Authority possessed a valid license. Under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), the District of Columbia Circuit had "exclusive" jurisdiction to determine the validity of that license. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-37 (1958). Now that the District of Columbia Circuit has held the license invalid insofar as it affects Tuscarora Reservation land, the Second Circuit decision is drained of all force and creates no live conflict.

there is a conflict as above described, a grant of certiorari limited to the third question set forth in the petition in the instant case becomes appropriate. See *Simpson & Co.* v. *Commissioner*, 321 U.S. 225, 229 (1944). Moreover, still pending before this Court is an appeal from a portion of the judgment of the Second Circuit in the instant proceeding. *Johnson* v. *Tuscarora Nation of Indians*, No. 386, Oct. Term, 1958. While petitioner submits, as it has already informed the Court, that this appeal is completely moot and, in any event, should be affirmed or dismissed, the Court conceivably may want to review all the aspects of the litigation growing out of the attempt by the Power Authority of the State of New York to utilize lands of the petitioner for the Niagara Project. In that event, the third question presented by the petition for a writ of certiorari in this proceeding becomes appropriate for consideration.

Petitioner accordingly prays, but only in the event that the Court determines to grant review in Nos. 386, 911 or 921 as above described, that rehearing be granted herein and that the petition for a writ of certiorari to the Court of Appeals for the Second Circuit be granted, limited to the third question presented.

Respectfully submitted.

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May 21, 1959.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

ARTHUR LAZARUS, JR.

EUGENE GRESSMAN